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VOTERS WISELY REJECT PROPOSED CONSTITUTIONAL AMENDMENT 30 TO ELIMINATE THE MONTANA BOARD OF REGENTS

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I. INTRODUCTION

On November 5, 1996, Montana voters made perhaps the most significant higher education policy decision in the state's history by resoundingly rejecting proposed Constitutional Amendment 30 (C-30) to eliminate the Montana Board of Regents.[1] C-30 would have replaced the constitutionally autonomous Regents with a much weaker Education Commission directed by a gubernatorial employee and having powers set solely by the Montana Legislature. C-30 raised the specter of Montana history repeating itself by returning to the same type of failed governance structure rejected by Montana's 1972 constitutional framers. By rejecting C-30, the voters in 1996 reaffirmed the mission of Montana voters who created the Board in Montana's 1972 Constitution as a buffer against this historical past.[2] These 1972 founders spurned more than 80 prior years of weak, ineffective leadership caused by the predecessor governing board's lack

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1. 242,146 people (63 percent) voted against C-30, while 142,224 people (37 percent) voted for it. Montana Secretary of State Official 1996 Election Results (visited May 7, 1997) <http://www.mt.gov/sos/election.htm> (on file with the *Montana Law Review*).

2. The 1972 Montana Constitution expressly provides: "The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility and authority to supervise, coordinate, manage and control the Montana university system . . . . The board consists of seven members appointed by the governor and confirmed by the senate, to overlapping terms, as provided by law. The governor and superintendent of public instruction are ex officio non-voting members of the board." MONT. CONST. art. X, § 9, cl. (2)(a), (b). Montana Code section 2-15-1508 grants the regents seven year terms except for a full-time Montana public campus student, whose term shall be 1-4 years. This Code section also provides that no two regents may be from the same state redistricting commission district as defined in Montana Code section 5-1-102; and that no more than four regents may be members of the same political party. Subsection 2-15-1508(3) of the Montana Code excepts the student regent from these geographic and political party restrictions.

of viable legal authority or structure and effectively insulated public campuses from Montana political officials in lieu of giving these political officials more direct control over public campuses. This lack of viable authority or structure contributed to Montana's well documented history of having one of the most politically controversial and poorest quality public higher education systems in the United States.

Of course there was no assurance that the history of the regressive pre-1972 era would be repeated merely by elimination of the Regents as a constitutionally autonomous governing body. Moreover, neither sound policy nor top quality higher education in fact necessarily require constitutionally autonomous governing boards. Well over half of the states in the country rely on legislatures rather than constitutions to define public campus governing board powers and there is no apparent harm to campuses or to the public. Nonetheless, Montana voters chose not to risk the governance system they had placed in the Constitution in 1972.

C-30 approval would have made Montana the first state to ever abolish a constitutional higher education governing board. This in turn would likely have generated controversies over several critical issues which received little attention in Montana during the C-30 debate. These critical issues include accreditation, academic quality, stability, the costs of any change, and the legal nature of any post-approval system.

Although the voters effectively killed C-30 at the polls in November, there are currently two new attacks to Montana's Board of Regents and its constitutional powers. The first attack comes from legislators who led efforts to get C-30 on the ballot with the objective of abolishing the Regents.[3] The second attack comes from the Montana Board of Land Commissioners, five state elected officials who have embroiled the Regents in a constitutional crisis now pending in the Montana Supreme Court over Regents powers to transact Montana University System property.[4] These attacks evidence the ongoing desire to elimi-

3. *See* discussion *infra* part VIII.A.

4. *Compare* MONT. CONST. art. X, § 4 ("The governor, superintendent of public instruction, auditor, secretary of state, and attorney general constitute the board of land commissioners. It has the authority to direct, control, lease, exchange, and sell . . . lands which have been or may be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be provided by law.") *with* MONT. CONST. art. X, § 9, cl. 2(a) ("The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system . . . "). *See* discussion

nate or weaken the Regent's constitutional authority in Montana. Clearly, this issue was not fully resolved last November and warrants further examination to benefit future discussion.

This article seeks to identify and assess the more significant legal and related policy issues surrounding public higher education governance in general, as well as Montana's public higher education governance in particular, with special emphasis on C-30 in the United States higher education and Montana historical contexts. Part II of this article presents a legal and historical profile of the United States public higher education governance systems. This profile shows how Montana, both currently and as C-30 proposed, would have radically departed from all other state public university governance systems. Part III describes Montana's public higher education governance history both before and since the Board of Regents was created in 1972. This review of history illustrates why Montana's pre-1972 past made C-30 particularly ill-advised and describes the genesis of C-30.

The article next explores, in Part IV, the primary arguments utilized to support or oppose United States public governing boards' legal autonomy. Part V assesses how governing boards without such autonomy subject a state's public universities to significant accreditation, academic quality and legal instability problems. Part VI describes higher education restructuring efforts in other states not considered in the C-30 debate, and suggests that C-30's fiscal costs could well have exceeded its benefits had the amendment received voter approval. Part VI also suggests how current Montana law, with relatively few amendments, might avoid some of the problems inherent in eliminating the Board of Regents should C-30 re-emerge. Part VII identifies the legislative and Land Board attacks on the present Regent's autonomy and suggests that the C-30 controversy may be far from over. Finally, based on review of these issues applicable to Montana public higher education, Part VIII concludes that Montana voters made the right decision last November in defeating C-30 and maintaining a constitutionally autonomous[5] Montana

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infra part VIII.B.

5. For purposes of this article, the term "constitutional autonomy" refers to exclusive management and control of a state's public higher education system (or in some cases individual institutions) by a governing board created in express constitutional language as recognized by a state's highest court.

A definition originally developed in Joseph C. Beckham, Constitutional Autonomy: Legal Implications for the State University System of Florida v (1977) (unpublished Ph.D. dissertation, University of Florida) (on file with author) [hereinafter Beckham Dissertation]. Dr. Beckham, a Professor of Higher Education at Florida

Board of Regents.

II. UNITED STATES PUBLIC HIGHER EDUCATION GOVERNANCE AND AUTONOMY: A LEGAL AND HISTORICAL PROFILE

Meaningful C-30 analysis requires understanding United States public higher education governance structures, as well as the historical context in which such structures were created.

A. United States Public Higher Education Boards: A Legal Profile

Although each state makes its own laws which create its own unique public higher education system governance structures, three general types of legal structures (organized into three groups of states) have emerged over the years to characterize state system governance.[6] The first state group includes Montana and uses a legal model with a single statewide board responsible for governing most or all public degree-granting campuses. (This is the model now educating over 70 percent of all United States college students).[7] These governing boards differ from state coordinating boards found in the minority of states.[8]

Classifying public higher education systems according to their legal status has proved difficult because each state's highest court tends to construe its own state constitution and statutory provisions applicable to governance without regard to comparable constitutional and statutory governance language in other states.[9] However, different methods have been developed to clas-

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State University, is also an experienced attorney whose works in this field have been cited by every subsequent study.

6. The most recent EDUCATION COMMISSION OF THE STATES (ECS) POSTSECONDARY EDUCATION STRUCTURES HANDBOOK (1994) [hereinafter HANDBOOK] describes all the U.S. legal public higher education governance structures, noting: "All states assign responsibility for the operation of public colleges and universities to governing boards usually named either Boards of Trustees or Boards of Regents." *See* HANDBOOK, *supra* at 3 and Section C. ECS is a nonprofit, nationwide interstate compact formed in 1965 by all 50 states plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands and American Samoa "to help governors, state legislators, state education officials and others develop policies to improve the quality of education at all levels." *Id.* at ii.

7. *See id.* at 3.

8. State coordinating boards have limited decision-making authority over campus and system personnel or budget activities; although a discernible number of states follow Montana's approach by combining governance and coordination responsibilities into a single board. *See id.*

9. For example, although 35 states have constitutions creating or authorizing creation of public systems, institutions and/or governing boards, only 14 of these

sify these. Dr. Beckham classifies states into two groups: those where a state's constitutional language grants broad autonomy powers which might or might not have been limited by judicial action; and those where the state constitutional language grants its legislature a limited governance role which has been restricted by court decision in favor of board autonomy.[10] The Education Commission of the States (ECS) classifies groups based on whether all public campuses in a given state are placed under a single constitutionally created governing board; and also on whether a constitution expressly allows legislative involvement.[11]

A second, larger state group has public higher education systems, institutions and/or governing boards cited in its members' respective constitutions; but these states expressly give their respective legislatures "substantial power to oversee operation and management of" public higher education.[12] As Dr. Beckham notes, "the constitutional status of public higher education in these states does not suggest a high degree of autonomy. Likewise, judicial decisions in these states have not confirmed

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states have boards with a level of constitutional autonomy as defined by Dr. Beckham.

10. Dr. Beckham lists Alabama, Georgia, Louisiana, Michigan, Minnesota, Missouri, Montana, North Dakota, Oklahoma and Utah as states with broad constitutional autonomy language not authorizing legislative involvement in governance even though Missouri's and Utah's courts have somewhat limited their respective boards' autonomy. *See* Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 179-80 (1978) [hereinafter Beckham, *Reasonable Independence*]. He then lists California, Idaho, Nevada and South Dakota as constitutionally autonomous board states with varying degrees of legislative activity authorized in their boards' respective constitutional creation language. *See id.* at 180.

11. This results in a list of 14 states somewhat different from Dr. Beckham's. *See* HANDBOOK, *supra* note 6, § C at 89. This list, which includes Arkansas, California, Colorado, Georgia, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Dakota and Oklahoma, is based less on autonomy than on actual legal structure language in each state's constitution. Note that Montana is on both lists.

12. Beckham, *Reasonable Independence*, *supra* note 10, at 180. Although Dr. Beckham only lists and discusses some of these states, they probably include Alaska, Arizona, Arkansas, Colorado, Florida, Hawaii, Kansas, Mississippi, Nebraska, New Mexico, New York, North Carolina, Texas, Washington, Wisconsin and Wyoming since their respective constitutions all expressly authorize public governing boards subject to the general powers of their legislatures. *See also* Sylvia R. Reynolds, The Autonomy of the Arizona Board of Regents Under the State Constitution 46-52 (1992) (unpublished Ph.D. dissertation, Arizona State University) (on file with author). Pennsylvania and Virginia might also be included in this list to the extent their respective constitutions specify some higher education board governance powers subject to legislative control.

broad constitutional autonomy for the higher education system."[13] A typical state in this group is New Mexico, which constitutionally requires that the "legislature shall provide for the control and management" of each public higher education institution "by a board of regents."[14] Finally, a third state group roughly the size of the full constitutional autonomy group defines its members' public higher education governance systems solely by statute without any constitutional reference. For the level of autonomy needed to function effectively and avert the problems discussed more fully below, these statutorily created boards rely on "sources other than the state constitution, including the enactment of corporate status, special statutes exempting them from general state legislation, their academic tradition, and the normal amount of administrative discretion permitted most statutory agencies."[15]

As indicated above, because the 1972 Montana Constitution created the Board of Regents based on Michigan's autonomy model—a model which placed Michigan within the group of states that has the fullest constitutional autonomy—Montana falls within this first group of states as well.[16] The status of

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13. Beckham, *Reasonable Independence*, *supra* note 10, at 180.

14. N.M. CONST. art. XII, § 13. This is similar to language in C-30, which would have replaced the Montana Board of Regents with a "State Education Commission" to have "duties as assigned by law." *See* ch. 156, 1995 Mont. Laws 442.

15. Reynolds, *supra* note 12, at 50. These states include Connecticut, Delaware, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, Vermont and West Virginia.

Dr. Reynolds notes that those boards

> with statutory status are continuously subjected to legislative . . . prerogatives. [A number of state court decisions] "support the principle that constitutional status provides the university system greater autonomy over those . . . legislatively created. Thus, higher education leaders prefer . . . constitutional status because it generally provides . . . greater security and places them in a better legal position to negotiate with the legislative and executive branches. In contrast, statutory governing boards are treated as state agencies, or state departments, and can operate only within the legal framework defined by the legislature . . . the statutory university system can be forced to comply with state government . . . planning, budgeting, coordination, construction, auditing, personnel, and the deposit of funds with the state treasurer. The legislature can also pass laws affecting its affairs, subject only to the constraints imposed by the state and the federal constitutions and federal law, such as those relating to speech, assembly, academic freedom and press.

Id. at 48-49.

16. Michigan, generally viewed as the most autonomous public higher education state in the United States, has long headed this list of states having the fullest constitutional autonomy. Montana's place on the list is far from coincidental, since the 1972 Montana Constitutional Convention delegates conscientiously chose Michigan

Montana's Board is explained below in an examination of the histories of both Michigan's and Montana's paths to autonomy, which in turn parallel an overall inclination towards lay governing board independence from politicians in American public education.

B. United States Public Higher Education Governance: A Brief History

Religious groups created and directed America's first colleges and universities that emerged during the seventeenth century colonial period and dominated United States higher education through the mid-nineteenth century.[17] Although these religiously affiliated schools received heavy public subsidies from both colonial legislative bodies and the British Crown, the school governing boards zealously guarded their autonomy to set all campus policies. This tradition of freedom from political interference continued into early post-colonial America and helped contribute to the first higher education board autonomy case ever to reach the United States Supreme Court.

Dartmouth College v. Woodward[18] rejected an attempt by the New Hampshire Legislature to create a state overseer board to assist the college board of trustees with campus governance. Daniel Webster represented Dartmouth and argued that legislation which impaired Dartmouth's original charter violated the United States Constitutional protection of a contractual right to independence. Chief Justice Marshall agreed in the Court's majority opinion, which strongly favored autonomy for all colleges.[19] Justice Marshall's concern for autonomy was not limited to

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as the autonomy model they wished to emulate.

17. *See* Beckham Dissertation, *supra* note 5, at 13-21. For example, Puritans founded Harvard in 1636 and Yale in 1702; Anglicans founded William and Mary in 1693; and during 18th Century Colonial America, Presbyterians founded Princeton; Episcopalians founded Columbia; Baptists founded Brown; Reformists founded Rutgers (which later became public); and Congregationalists founded Dartmouth.

18. 17 U.S. (4 Wheat) 518 (1819).

19. *Dartmouth College*, 17 U.S. at 598. Chief Justice Marshall stated:

> They [America's colonial colleges] have flourished hitherto, and have become in a high degree respectable and useful to the community . . . . It will be a dangerous, a most dangerous, experiment to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions . . . . Benefactors will have no certainty . . . of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become a [theater] for the contention of politics; party and faction will be cherished in the places con-

private colleges. He drew heavily upon an earlier state court autonomy decision involving the University of North Carolina.[20] This early nineteenth century case relied on by the Court in *Woodward* favored public campus autonomy—autonomy which was manifested in the first United State public university, the University of Virginia. The University of Virginia was founded by Thomas Jefferson with a secular purpose and an intent of receiving heavy public financing from the legislature. Despite the fact that Jefferson was one of America's strongest legislative democracy advocates (and no political ally of Justice Marshall), he intended the University Board of Visitors to have "all powers which had been customarily exercised by incorporated boards" of colonial and early post-colonial private colleges and universities.[21] Most so-called "public" campuses during this period were publicly chartered by state legislatures and received large sums of public funds from various sources, including special taxes, appropriations, tolls and even special lotteries. However, the governing bodies of these campuses functioned like private corporate boards free from political intrusion.[22] This principle, that higher education should be free from political intrusion, served as a common conceptual reference point for early American leaders such as Jefferson, Webster and Marshall.

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secrated to piety and learning.

Id.

20. *See* Trustees of the Univ. of North Carolina v. Fry, 5 N.C. 57 (1805). The case involved a similar attack by one of America's first public university governing boards against state legislation attempting to repeal a law guaranteeing escheat property transfers to the University. In favoring the University, North Carolina's Supreme Court cited the state constitution requiring that "all useful learning . . . be encouraged in one or more universities" to declare the University of North Carolina "agents of the people . . . over which the power of the Legislature ceased." *Id.* at 62. It should be noted this case was later overturned in University of North Carolina v. Maultsby, 43 N.C. 257 (1852).

21. J.S. BRUBACHER & W. RUDY, HIGHER EDUCATION IN TRANSITION: A HISTORY OF AMERICAN COLLEGES AND UNIVERSITIES, 1936-1976, at 147-49 (3d ed. 1976).

22. *See id.* at 35-36, 145-46. As Dr. Delgado notes, autonomous lay boards have deep American roots:

> From the founding of the earliest American colleges, the public interest in higher education has been personified in both independent and public institutions by the lay board of trustees. A common defense of boards is that they protect the broadly defined public interest by simultaneously shielding the institution from shortsighted external influences and ensuring that parochial interests are not served at the expense of essential societal needs.

Rosa A. Cintron Delgado, History of the Inclusion of the Governing Board Concept as a Requisite for Accreditation in the Commission on Colleges, Southern Association of Colleges and Schools: Implications for Policy Formulation 43-44 (1992) (unpublished Ph.D. dissertation, Florida State University) (on file with author).

American distrust of political control over United States higher education continued well into the nineteenth century. The University of Michigan, hailed as "the most complete embodiment of the Jeffersonian ideal of higher education in the pioneer West" and also as "instrumental in defining the role of the [modern] state university," received autonomy from the Michigan Legislature to reverse decades of unhealthy political meddling.[23] To remedy the excesses of legislative interference, the 1852 Michigan Constitution Convention proposed granting the University of Michigan Board of Regents "the general supervision of the University and direction and control of all expenditures from the University Interest Fund."[24] In doing so, the Michigan Supreme Court found that Michigan's citizens directed the court to place these universities "beyond mere political influences" in entrusting them to the governing boards.[25] The Michigan Supreme Court has staunchly defended Michigan's public university board autonomy from legislative and executive branch encroachment ever since. It perhaps warrants mention here that Michigan's Constitution calls for popular election of that state's public university governing board members as an additional means of insulating these boards from legislators and executive branch

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23. *See* Beckham Dissertation, *supra* note 5, at 24-25 (other citations omitted). The argument by which legislatures have hitherto convinced themselves that it was their duty to legislate universities to death is this: "It is a state institution, and we are the direct representatives of the people, and therefore it is expected of us; it is our right. The people have an interest in this thing and we must attend to it." As if because a University belongs to the people, that were reason why it should be dosed to death for fear it would be sick if left to be nursed, like other institutions, by its immediate guardians. Thus has state after state, in this American Union, endowed universities and then by repeated contradictory and overlegislation, torn them to pieces with the same facility as they do the statute book, and for the same reason, because they have the right.

Id. 26-27 (quoting Mich. H.R. Documents of 1840, at 470).

24. *See id.* at 27, (citing 1850 MICH. CONST. art. XIII, § 8). University of Michigan President Henry Tappan, among the country's leading public higher education leaders of his day, hailed his state's constitutional autonomy gift by describing its importance in the creation of a top quality public university:

> The University as an institution of the State, open to all the people of the State, and affording to them the means of the highest education, is a symbol of the essential union of all religious sects, and of all political parties . . . . Whatever may be our differences, we have a common agreement—a common interest in the great subject of education. It is part of wisdom to preserve the University intact from the questions on which we differ, and to maintain and foster it purely as an educational institution.

Id. at 25 (quoting Henry Tappan).

25. *See* Sterling v. Regents of the Univ. of Mich., 68 N.W. 253, 254 (Mich. 1896).

officials. However, a number of other states[26] adopted the Michigan constitutional autonomy model (without board member elections) by the end of the nineteenth century "to remove questions of management, control and supervision of the universities from the reach of politicians in state legislatures and governors' offices."[27] Many of the country's great public higher education systems and institutions of the nineteenth century took deliberate constitutional paths to political and legal autonomy in order to obtain the quality they were seeking. United States higher education in general, and public higher education in particular, grew heavily in the last half of that century. This growth followed both the 1862 Morrill Act which was passed by Congress to create federally supported land grant colleges, and the many state laws which earmarked state property taxes to fund these colleges.[28]

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26. This list includes Nevada, Missouri, Colorado, Idaho, South Dakota, Alabama, Minnesota, California, Utah and Oklahoma. *See* Beckham Dissertation, *supra* note 5, at 28.

Minnesota's Supreme Court emphatically lauded its state's constitutional mandate "to put the management of the greatest state educational institution beyond the dangers of vacillating policy, ill-formed or careless meddling and partisan ambition that would be possible in the case of management by either [the] legislature or the executive" branches of government. State ex rel. University of Minn. v. Chase, 220 N.W. 951, 957 (Minn. 1928) (cited favorably in Regents of Univ. of Minn. v. Lord, 257 N.W. 2d 796, 800 (Minn. 1977)).

27. *See* Beckham Dissertation, *supra* note 5, at 28 (citations omitted). Dr. Eykamp explains why California chose Michigan's autonomy model: "Early experience with the University of California . . . indicates that when the legal definition of the University and the authority of its governing board depended on statute law, universities had difficulty attracting and keeping faculty and administrators." Paul W. Eykamp, Political Control of State Research Universities: The Effect of the Structure of Political Control on University Quality and Budget 58 (1995) (unpublished Ph.D. dissertation, University of California at San Diego) (on file with author) (emphasizing difficulties in finding University of California Presidents before the Regents were created as part of California's Constitution in 1876, a phenomenon subsequently seen a number of different times in Montana before 1972). Dr. Reynolds explained the basis for this U.S. mood of the times:

> [I]n the middle of the Nineteenth Century there was pervasive public opinion that higher education should be removed from the day-to-day machinations of the state capital, and protected from religious and political pressures because the state university was conceived to be unique in its goals and characteristics. The belief was that when either bureaucracy or partisanship infringed upon the authority of the governing board, both the intellectual and institutional independence of the [campuses] were threatened.

Reynolds, *supra* note 12, at 5 (citations omitted).

28. *See* Beckham Dissertation, *supra* note 5, at 23 (citing overall U.S. campus enrollment in 1870 as 67,350; 156,756 in 1890; and 355,215 in 1910, with growth primarily in the public sector).

Public higher education growth surged even more during the twentieth century and strong central state governments also grew to oversee the provisions of new state social services.[29] State government management centralization slowed the trend towards public higher education governing board autonomy. This slowing occurred as states opted for more direct control over campus activities at the same time that public expenditures for higher education shrunk between 1910 and 1964.[30] Although a discernible number of states bucked this trend and created constitutionally autonomous (or in some cases, more autonomous) boards, this often came in response to excessive political meddling. Such meddling, in turn, triggered the ousting of incumbent governors and creation of major accreditation crises.[31] The majority of states chose systems that provided more board political control.

The trend towards less state campus and system autonomy did not go unnoticed in Washington, D.C. Deep national security concerns about Soviet threats to peace following the 1957 Soviet Sputnik launch forced a national level assessment of how United States public higher education could help combat these fears. In 1959 the Eisenhower Committee, headed by President Eisenhower's brother Milton, was created to study this issue in depth. The committee of experts, whose work significantly influenced Montana's 1972 Constitution, attacked state encroachment in public university autonomy as a major problem area for the country. Based on the Committee's finding that "intervention of state agencies into ostensibly nonacademic areas can quickly penetrate to educational policy," the Committee concluded that "[p]rotecting the authority of lay governing boards from interference by state agencies was vital to the preservation of intellectual freedom."[32]

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29. *See id.* at 36.

30. *See id.* at 35-36

31. *See, e.g.*, discussion *infra* part VI.A.2.

Alaska and Hawaii, the newest U.S. states, appeared to model their systems after the ones perceived to be among the nation's strongest, such as Michigan and California (although whether they succeeded may be debated). *See* Beckham Dissertation, *supra* note 5, at 38 (listing North Dakota, Louisiana, Mississippi, Georgia, Hawaii, Alaska and Montana as the states creating or increasing constitutionally autonomous boards between 1930 and 1972).

32. *See id.* at 37 (citing COMMITTEE ON GOVERNMENT AND HIGHER EDUCATION, THE EFFICIENCY OF FREEDOM 6-7 (1959) (emphasis added) [hereinafter THE EFFICIENCY OF FREEDOM]. A companion study published concurrently with the Committee findings sharply criticized the "debilitating impact of state administrative controls" on public higher education and

The work of the Eisenhower Committee had its intended effect of forcing states to rethink their public higher education governance systems with an eye towards addressing committee efficiency and autonomy issues. By the early 1970s, most states addressed concerns with inefficiency by consolidating their respective governance systems into fewer governing boards.[33] Facilitating this consolidation were two Carnegie Commission Higher Education Reports which urged state governments to diminish "the indirect controls exercised by centralized purchasing, state civil service, and budgetary or comptrolling agencies" because they caused needless "encroachments upon the traditional independence of the higher education system."[34] The Commission deemed "reasonable independence from state government a priority issue for American higher education." It advocated that "higher education should be substantially self-governing in its administrative arrangements, academic affairs, and intellectual conduct."[35] Most states were all too willing to oblige.[36]

States which had drifted away from autonomy over the years seemingly corrected their course and opted for public higher education systems more like the one Montana voters created in 1972 and kept in 1996. These other states did so either by constitutional reform, or by statutorily ensuring full board indepen-

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> further underscored the need for safeguards to protect the independence of the college and university. . . . However petty each instance of control may be, in cumulative effect a broad range of restrictions upon the operating freedom of institutions of higher education leaves very little room for imagination and vitality by which truly creative institutions of higher learning are nourished.

Id. at 38 (citing M. MOOS & F. ROURKE, THE CAMPUS AND THE STATE 323 (1959)).

33. *See* Richard J. Novak, *Methods, Objectives, and Consequences of Restructuring, in* RESTRUCTURING HIGHER EDUCATION: WHAT WORKS AND WHAT DOESN'T IN REORGANIZING GOVERNANCE SYSTEMS 20 (Terrence J. MacTaggart & Assocs., ed. 1996) [hereinafter RESTRUCTURING HIGHER EDUCATION].

34. Beckham Dissertation, *supra* note 5, at 41 (citing CARNEGIE COMMISSION ON HIGHER EDUCATION, THE CAPITOL AND THE CAMPUS 100 (1971)).

35. *Id.* at 42 (citing CARNEGIE COMMISSION ON HIGHER EDUCATION, GOVERNANCE OF HIGHER EDUCATION: SIX PRIORITY PROBLEMS 19 (1973) [hereinafter CARNEGIE COMMISSION]).

36. Novak, *supra* note 33, at 20 ("In many states undergoing consolidation, state lawmakers also wanted to put some political distance between themselves and higher education. Many clearly felt the need for objective professional advice to help them make decisions or to free them from having to make politically difficult choices.")

In studying public higher education governance trends and developments throughout the U.S., ECS found that 12 states strengthened their state boards during the 1970's; another 10 did so in the 1980's; and only one state, West Virginia, weakened its Board of Regents by abolishing that entity and dividing its powers into two newly created successors. HANDBOOK, *supra* note 6, at 23-28.

dence.[37]

C. State Education Department Heads With Higher Education Governance Responsibility: A Nonexistent Model in the United States

C-30 approval would have taken Montana in a direction contrary to nearly the rest of the country, likely raising many issues already addressed and effectively resolved in other states. It would also have taken Montana back to a history which Montana voters spurned for good reason, as seen below. C-30 partly contemplated an education commission model not too different from higher education governance structures in many other states which define governing board powers by statute. However, it also proposed another element which deviated substantially from any other United States governance model: a gubernatorially appointed and controlled Education Department Director who serves as Commission President. No other state has a model which combines a public board with legal governance powers,[38] with a gubernatorial cabinet member likely to have public campus governance authority.

Although a handful of states including Colorado, Maryland, New Jersey, Oregon and Pennsylvania have gubernatorially appointed officials who direct state higher education coordinating boards, none of these boards has any campus governance powers. Moreover, all but one of these states have multiple governing boards to oversee their respective public campuses and systems.[39] The governing boards in these five states and every other state governing board in the country, including states like

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37. For example, New Jersey's 1994 higher education reform abolished that state's Higher Education Department (a traditional government agency like the State Education Department proposed in C-30); replaced its state Higher Education Board, a coordinating entity, with a smaller Higher Education Commission having similar coordinating functions; and perhaps most importantly, increased the legal autonomy of that state's public campus governing boards over virtually all their own key decisions. *See* N.J. STAT. ANN. § 18A:3B-1 (West 1995); Patricia Alex, *Smaller Government's Casualties Higher Ed Board: Verdict is Still Out*, REC. N. N.J., July 2, 1995, at 001. These changes appear to differ substantially from how C-30 proponents have recently described them in C-30 debates, since proponents cite New Jersey's changes as evidence of more legislative accountability; while Governor Whitman and the legislature made clear in the restructuring law that *increased legal autonomy for the campuses* was a key reason for passing it.

38. These powers are required for university accreditation.

39. Oregon does not have a multiple governing board to oversee their respective public campuses and systems because its state higher education board appoints its own chief executive officer.

Montana which combine coordination and governance into one board, hire their own chief executive officers.[40] Whether the Education Commission proposed in C-30 would have received the power to hire their own officers is far from clear. This uncertainty, given a lack of any comparable state model, raises questions about whether C-30 approval would have triggered needless legal instability and uncertainty for Montana's public universities. It also hearkens back into Montana history when uncertainty about state board executive officer power plagued the state for many years.

III. MONTANA PUBLIC HIGHER EDUCATION GOVERNANCE BEFORE AND SINCE 1972: SOME HISTORY LESSONS WELL WORTH LEARNING

Montana's public higher education history before 1972 was by most accounts a marked failure, characterized by: (1) a weak state governing board charged with overseeing both higher and elementary-secondary education, with few resources to do this effectively; (2) decades of repression against some of Montana's ablest university faculty members, resulting in blacklisting by the most prestigious academic organization in the country; (3) chronic public university underfunding by the Montana Legislature, exacerbated by the state's poor public higher education reputation and compounded by few non-state donors or dollars needed to supplement meager state support; and (4) a lack of confidence in the public education system, re-enforced by an inability of campuses to recruit talented faculty and administrators to work in the state because of these problems.[41] By the time the 1972 Constitutional Convention was called, most Montanans were clamoring for change and strong public higher education leadership. By 1996, twenty-four years after the marked changes in the Constitution, Montanans evidenced faith in the Board of Regents' autonomy by rejecting C-30.

A. Montana Governance History Before 1972

1. Territorial and Early Statehood Days: Montana's First Campuses and State Board of Education, 1885-1911

Montana public higher education governance history began

40. *See* HANDBOOK, *supra* note 6, especially Section A.
41. *See* discussion *infra* part IV.A.

with high hopes and expectations even before Montana became a state or had its first campus. Territory leaders of 1884 drafted a proposed state constitution which created a Board of Regents, apparently modeled after California's successful model adopted some ten years earlier. The Board of Regents had general supervision of a University of Montana.[42] The United States Congress approved the proposed 1885 Constitution as a prerequisite for statehood; but the 1889 Montana Constitutional Convention rejected the Board of Regents and created a State Board of Education responsible for all Montana public education.[43] The main justification for this change appears to have been a concern that too many "technical and other schools" would encroach on each other if the Constitution allowed multiple boards.[44]

The 1889 Constitution placed the Governor on the Board, thereby assuring direct executive branch oversight of higher education. The framers also made the Board dependent upon the legislature as the sole source of authority by requiring that all Board "powers and duties shall be prescribed and regulated by law."[45] This legal structure remained essentially unchanged until 1972.

Montana's 1893 Legislature gave the Board various statutory powers to oversee universities, elementary and secondary schools; and even authorized establishment of various public campuses in Bozeman and Missoula, as well as a teacher training campus in Dillon and a school of mines in Butte.[46] The campuses in Dillon and Butte proved a perennial source of controversy even before they opened due to concerns that the state could not fund them and doubts about whether the Dillon location could attract sufficient enrollment.[47] However, the Board lacked the power to address these concerns. In addition, the Board's

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42. *See* Edward B. Chenette, The Montana State Board of Education: A Study of Higher Education in Conflict, 1884-1959 23-24 (1972) (unpublished Ed.D. dissertation, University of Montana) (on file with the University of Montana Library). This 1885 language bore close similarity to the language approved 87 years later in 1972. *Id.* at 25.

43. *See id.* at 24, 29-31.

44. *Id.* at 30.

45. MONT. CONST. art. XI, § 11 (1889). *See also* Hugh V. Schaefer, *The Legal Status of the Montana University System Under the New Montana Constitution*, 35 MONT. L. REV. 189 (1974). The Board, "although a constitutional entity, nevertheless was completely dependent upon the legislature for its powers and duties . . . Until the legislature passed laws which implemented the constitutional mandate, the board was virtually powerless." *Id.* at 191.

46. *See* Chenette, *supra* note 42, at 50-58.

47. *See id.* at 48-49, 65.

scope of power in other key areas such as authority to receive and spend state funds on the campuses was in doubt.[48]

Montana higher education had mixed success in the 1893 Legislature, which followed a pattern it would repeat for many years: appropriating funds well in excess of what could be legally spent under the Constitution. This forced the State Board of Examiners (composed of the Governor, Attorney General and Secretary of State) to freeze the excess appropriations.[49] Only Bozeman could open for classes because it had already received federal Morrill Act funds as Montana's land grant campus.[50] However, the other three campuses also ultimately opened and Montana's public higher education system was born.[51]

Auspiciously, in 1895 and 1896, the Board's new problems began with spending authority and academic personnel. The Board had to sue Montana's State Treasurer to force a $10,000 payment for the Bozeman campus when the Treasurer refused to release the funds despite a legislative mandate to do so.[52] Although the Board won the case, this neither clarified Board powers in subsequent similar disputes nor endeared the Board to other state officials.

The Board also faced a major academic personnel crisis when the Bozeman Local Executive Board (created by statute to oversee local campus affairs, without clear direction on how to answer to the State Board) demanded resignations of the President and a dozen faculty members for no apparent reason.[53] The Local Board chose to dismiss three of the faculty members and the State Board upheld the Local Board's action with little explanation.[54] Dr. Chenette, one of Montana's leading higher education historians, noted:

> Unfortunately for higher education in Montana, the arbitrary dismissal of the three professors was not an isolated incident. For with their decision in 1896 to sustain the local executive board . . . the State Board of Education was embarking on a forty-five year spree of star chamber proceedings, book-burnings, suppression of academic freedom and the firing, without hearings, of both professors and presidents. Four times in the

48. *See id.* at 65.
49. *See id.*
50. *See id.*
51. *See id.* at 64-66.
52. *See id.* at 90-91.
53. *See id.* at 93-94.
54. *See id.* at 94-96.

> years to come the action of the State Board of Education would cause an institution of higher learning in Montana to be investigated and blacklisted by the [AAUP].[55]

He also notes, however, that these problems likely occurred, in part, because of Montana's history of labor strife and bitter political partisanship.[56] These problems somewhat paralleled what was happening on campuses in other states.[57]

The last several years of the nineteenth century saw continued Board fiscal woes and personnel controversies effecting the campuses. The university had little ability to resolve the fiscal problems, "forced as it was to rely heavily upon legislative appropriations" which made campuses "too vulnerable to the prevailing political whims of the legislature. There was nothing to ensure a reasonable continuity in appropriations by the legislative body from biennium to biennium."[58] The state was so poor financially that the School of Mines, authorized in 1893 legislation, could not open until 1898, and the Bozeman campus faced serious financial problems when the state withheld payments of various funds.[59] The Board also adopted a controversial 1898 rule which did the following: (1) barred all outside faculty work absent presidential approval and all outside faculty work "which might impair . . . effectiveness;" (2) required full reimbursement to the state for all costs resulting from faculty outside work, even if approved; and (3) required payment of all outside faculty work income to the school.[60] The cumbersome provisions of this rule cost University of Montana Professor Elrod an important federal grant to study Montana's water, and almost cost him his faculty position when the Board criticized Professor Elrod's attempt to communicate his objection to the rule directly to the Board rather than through the University President.[61] The Board had to relax the rule some years later when the schools had difficulty attracting good quality faculty because of low salaries; and when the board learned that University of Montana law faculty were among the lowest paid in the nation, and thus harming the law school's reputation.[62]

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55. *Id.* at 96.
56. *See id.*
57. *See id.*
58. *Id.* at 109.
59. *See id.* at 109-10, 113-15.
60. *Id.* at 117-18.
61. *See id.* at 128.
62. *See id.* at 133-34, 143-44, 160-61.

2. The Repressive Years Begin: 1911-21

The years of 1911-21 represent a decade of extreme faculty and campus presidential political repression by the Board. The repression started with the 1911 firing of popular University of Montana President Duniway after only three years in the position.[63] His main difficulties with the Board arose over his insistence upon hiring law faculty from across the nation based on academic merit, rather than alumni lawyers practicing in Montana (including the locally powerful University Alumni Association President). The Board terminated him without a hearing.[64] In 1912, the Board hired former Tulane President Craighead, a nationally prominent educator and tried to put the controversy behind it. Shortly thereafter, however, the Board adopted a rule requiring all faculty to submit proposed publications for review by a Board Committee on Publications.[65]

Dr. Craighead's presidency proved to be relatively short-lived despite his prominence and relative popularity on campus because the Board fired him and three faculty members three years later.[66] This triggered a national higher education uproar over the Board's governance of Montana's public universities.[67] Dr. Craighead's problems appear to have stemmed partly from outspoken support for consolidation of Montana's public campuses into one state university despite strong gubernatorial opposition and despite decisive rejection by voters in a 1915 ballot issue. Dr. Craighead also had philosophical and political differences with Missoula's Local Executive Board Chair.[68] The three faculty members lost their positions as a result of testifying against Dr. Craighead at an impromptu "hearing" called by the Local Board Chair to review problems with Dr. Craighead's presidency, after which Dr. Craighead's State Board supporters (unable to block his firing) secured their terminations in the interest of even-handedness.[69] Investigating the faculty firings along with President Craighead's, the American Association of University Professors (AAUP) reviewed Board performance since its creation:

63. *See id.* at 191-94.
64. *See id.* at 188, 191-94.
65. This rule was adopted amidst heated public objection. *See id.* at 212-13.
66. *See id.* at 235, 237.
67. *See id.* at 261-65.
68. *See id.* at 236.
69. *See id.* at 237-38.

> The state board of education for many years has, as a body, apparently been destitute of a proper sense of the ordinary courtesies and amenities, in its dealings with officers and teachers of the universities.[70]

> [The Board also has] scant appreciation of the fact that the removal of a university president should take place only for serious cause and after full consideration; and equally scant appreciation of the fact that continuity of policy and stability in administration are important factors in the success of any institution of higher education.[71]

The AAUP also scathingly criticized the Board for the following: (1) allowing the Governor to influence President Craighead's firing over the latter's consolidation views; (2) President Duniway's "dead of night" dismissal over law school faculty hiring standards; and (3) Montana's "bad system of administration" as manifested by the Board's ongoing fights with the State Board of Examiners over university budget and spending authority.[72]

Finally, AAUP deemed President Craighead's firing an "unwarranted infringement of the liberty of utterance of educational officials upon questions of educational policy," and deemed the procedures for doing it "unsound in method and disastrous in its results."[73] It termed dismissal of the faculty members a "violation of the essential principles of sound educational administration" lacking "ordinary requirements of equity . . . an even worse violation of correct procedure, illogical and unethical to a degree."[74] AAUP members who signed this report included nationally and world prominent faculty leaders from Harvard, Brown, Columbia, Cornell, Yale, Princeton, Johns Hopkins, Indiana University, and the Universities of California, Washington and Wisconsin.

During the Craighead and faculty firings period, the Board hired Montana's first permanent Chancellor of Higher Education, Edward Elliot, who had in the past served as the University of Wisconsin Education Dean, in the hopes he would be able to

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70. *Id.* at 264 (citing *Report of the Committee of Inquiry Concerning Charges of Violation of Academic Freedom Involving the Dismissal of the President and Three Members of the Faculty at the University of Montana*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN 8 (May 1917) [hereinafter 1917 BULLETIN]).

71. 1917 BULLETIN, *supra* note 70, at 184.

72. *Id.* at 9-17, 84.

73. *Id.* at 42.

74. *Id.* at 43.

salvage the situation.[75] However, the damage to Montana's higher education reputation was serious, and the story was merely beginning.

A brief historical description of the chancellor position helps illustrate the political instability plaguing the State Board and Montana's universities in general. In 1914, the Board responded to extensive criticism about weak state higher education planning and administration by deciding to hire its first chancellor, with the ostensible blessing of the four campus presidents.[76] Less than a year later, the legislature responded by passing a bill to abolish the position, even while the Board was searching for a suitable candidate to fill it. Fortunately for Dr. Elliott, the Governor (a Board member and often the actual Board leader) vetoed the bill and the legislature sustained his veto.[77] Dr. Elliott set the tone for this era[78] by openly attacking and trying to abolish all student publications and many student organizations.[79]

The Board earned a reputation for repression partly by allowing the Montana Council of Defense[80] to dictate university academic and student enrollment policies by banning all German language books and classes.[81] The Council had broad subpoena powers to enforce its mandates, but the Board and Chancellor made certain that all campuses complied with whatever the Board instructed.[82]

The Board also earned its negative reputation for criticizing University of Montana faculty for "improper utterings and pri-

75. *See* Chenette, *supra* note 42, at 240. "Dr. Elliott, reportedly, was repeatedly warned by numerous prominent educators to stay away from Montana, that the situation was complex, dangerous and very likely unsolvable." *Id.* at 241.

76. *See id.* at 225.

77. *See id.*

78. Dr. Chenette describes the 1916-21 post-Craighead firing as "Years of Repression" and as "perhaps the most despicable period in the history of the State Board of Education. The Board knuckled under [to] the pressure groups both within and without . . . and permitted itself to become the prime instrument for the repression of higher education in the state." *Id.* at 244.

79. *See id.* at 251-52.

80. This is a state mega-agency created to assist the national World War I effort.

81. *See id.* at 270-74; "A watchdog agency of superpatriots, the Council came to rule every aspect of the daily lives of every man, woman, and child in the state during the World War [including] . . . what the people could say, what they could write; what they could read; [and] finally . . . what was to be taught in the schools and what books were to be kept in the libraries." *Id.* at 270.

82. *See id.* at 271.

vate teachings."[83] One faculty member, Dr. Louis Levine, became another national "cause celebre" to those favoring academic freedom when he was suspended from his economics professorship in 1919 for publishing a report which advocated taxing Montana's mining interests more heavily to help the state resolve its chronic fiscal crises.[84] In this instance, Dr. Elliott had apparently encouraged Dr. Levine to study the topic (and even appointed him to a special new state taxation study group) only to withdraw his support when faced with mining interests' attacks.[85]

After Dr. Levine had the report published without University support, Dr. Elliott suspended him without consulting the Board.[86] A special university committee reviewed Dr. Elliot's decision and urged the Board to lift his suspension.[87] The Board first refused, but after aggressive AAUP intervention in the case the Board reinstated Dr. Levine.[88] Despite Dr. Levine's reinstatement, the faculty formed a University American Federation of Teachers branch soon thereafter.[89]

The next Board faculty controversy involved University of Montana Law Professor Arthur Fisher, who incurred the enmity of several Board members and other elected officials, along with a number of conservative state groups, when he worked with a politically progressive newspaper in 1921.[90] After the Montana American Legion accused him of "pacifism" and draft-dodging during World War I and confronted the Board with Fisher's work with the newspaper, the Board suspended Professor Fisher.[91] Chancellor Elliott, who apparently disagreed with the Board decision, resigned his position and left Montana soon thereafter.[92]

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83. *Id.* at 274.
84. *See id.* at 280-81.
85. *See id.* at 278-83.
86. *See id.* at 281.
87. *See id.*
88. *See* Chenette, *supra* note 42, at 281-82. Dr. Chenette writes: "[The Board was] exposed for the second time in two years as being vindictive, capricious, and petty; and worst of all, the University System which, as everyone knew by now, was ruled despotically by a board of despots." *Id.* at 282.
89. *See id.*
90. *See id.* at 298.
91. *See id.* at 296-99; *Report on University of Montana*, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN (Mar. 1994). *See also*, Sheila Stearns, *The Arthur Fisher Case* (1969) (unpublished M.Ed. thesis, The University of Montana) (on file with author).
92. *See* Chenette, *supra* note 42, at 299-300.

The Fisher controversy was the last nationally visible Montana faculty dispute for two decades which involved the Board, as the Board turned its attention towards coping with a severe economic depression. However, other Board abuses of faculty continued during this period, until national attention again refocused on Montana.

3. Economic Depression: 1919-39

Montana experienced a major economic depression more than a decade before the rest of the nation, when severe drought combined with low farm prices devastated state finances. Even before this occurred, public campuses were experiencing fiscal stress because the state lacked money to fund them adequately. In 1916, Dr. Elliott publicly cautioned the Board that Montana's public campuses were headed for difficulty if funding could not be increased (at that time Montana ranked fortieth of the 48 states for public higher education spending).[93] The Board appeared ill-equipped to legally or politically respond, and when depression hit, the campuses were even more poorly equipped to deal with it effectively.

Dr. Chenette terms the depression period as "one of frequent and appalling asininity" manifested by the state's political leaders, who approved two new campuses at the height of the state and national depression despite having less state revenue for public higher education than was available 10 years earlier.[94] Even though these years began well when Montana voters approved both a higher education mill levy and a campus construction bond issue, feuds within the Board of Examiners over how to spend the bond money plagued the campuses for years to come.[95]

In 1923, the Board limited enrollment because the four existing campuses lacked enough buildings to accommodate the students seeking an education, even with the 1920 bond funds. Even if there had been enough money to pay to build additional

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93. *See id.* at 252-53.

94. *Id.* at 304-05.

> At a time when highly-qualified professors were deserting Montana's institutions by the score and it was necessary to hire poorly-qualified instructors because they would work for less money, the Board could fire with no compunction . . . exceptionally-qualified professors for the most foolhardy of reasons.

Id. at 305.

95. *See id.* at 289-94.

buildings, campus operating budgets were inadequate to hire enough faculty. Notwithstanding these problems, the 1925 Legislature approved two new campuses in Havre and Billings.[96] This legislative decision reduced funds available for the four existing campuses and forced the Board of Examiners to freeze some of their funds. The Board of Education responded by firing ten highly-qualified professors and replacing them with less qualified professors who would accept less pay.[97] State finances in general were so poor that the Board of Examiners tried to use higher education mill levy funds for non-campus purposes until the Montana Supreme Court barred this in 1926.[98]

In addition to the state's 1925-26 fiscal woes, the Board also provoked two academic freedom controversies in 1926. The first controversy occurred when the Board fired a popular, tenured, University of Montana faculty member from the English department, for assisting a student with a creative writing journal in his spare time.[99] The second controversy occurred when the Board fired a popular University of Montana faculty member from the Business School who had feuded with the President. This dismissal was followed by a Board investigation concluding that the President was at fault in the controversy. The Board then fired the President, but refused to reinstate the faculty member to his job.[100]

Montana's higher education problems in the 1920s did not go unnoticed by people in the state. This is evidenced by the fact that many citizens refused to send their children to study at the state's campuses for reasons unrelated to the depression since graduates from the state's high schools left Montana in droves to enroll in colleges outside the state. Only twenty-eight percent of high school graduates who went to college chose to do so in Montana.[101] In 1928, because of these conditions one-third of all

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96. Dr. Chenette writes: "Two less wise decisions, in view of the times, could not have been made by Montana's legislators. The state's four institutions of higher education, already established, were languishing for want of adequate funds." *Id.* at 314.

97. *Id.* at 317.

98. *See id.* at 319; State *ex rel.* v. Erickson, 75 Mont. 429, 244 P. 287 (1926).

99. *Frontier* was not even an official University publication. The journal published a scholarly article on a former Missoula brothel which caused mild public uproar, the professor's firing and the student writer's expulsion despite the lack of any prurient content. *Frontier*, an all-volunteer student effort off campus, ceased publishing even though it had developed a reputation "as the best of its kind in the nation" among student literary magazines. *See* Chenette, *supra* note 42, at 322-25.

100. *See id.* at 331-33.

101. *Id.* at 334. "The exodus of students was damning testimony of the sorry re-

University of Montana faculty resigned to go elsewhere to work as professors.[102]

In 1929 a special Educational Survey Commission created by the 1927 Legislature to study Montana public education informed the Board that "Montana lagged far behind all other Northwest states in the support of higher education. The future of higher education in Montana would be bleak, indeed, if financial support was not increased."[103] This report was so negative that the Board kept it from public release for nearly a year after completion, partly because it revealed that Montana was spending one-third less on its public campuses than any other state of similar age.[104]

Despite the state's depression, the Survey Commission report combined with a heavy advocacy campaign by the Board persuaded Montana voters to approve both a higher education mill levy increase and a new $4 million bond issue in 1930. However, regrettably, the Montana Supreme Court nullified the election because of sloppy language on the ballot and most of the funds were not forthcoming.[105] The effect of this decision was all too predictable. By 1932, higher education in Montana was a in sorry state—the majority of high school graduates were going to colleges out of Montana, the physical plants were decaying, a much needed bond issue was declared invalid, and less-qualified professors were hired as a matter of policy to save money.[106]

A few years later when University of Montana President Clapp died, the Board could find no non-Montana university presidents willing to apply for the job because campus finances

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pute into which the University System had fallen in 1927 among her own citizens, students and parents alike, and of the sad state of affairs (overcrowded conditions, the enforced hiring of poorly qualified professors, and deteriorating buildings) on all campuses." *Id.*

102. *See id.* at 336.

103. *Id.* at 338.

104. *See id.* at 332-33. The Legislature responded to the above problems by either ignoring them, or by forcing the overcrowded, underfunded campuses to do even more work with fewer resources. In 1929, Montana's Supreme Court upheld the validity of a 1927 law requiring the Bozeman campus to do free chemical testing of oil products for other state agencies and the Board was powerless to stop it. *See* State *ex rel.* Pub. Serv. Comm'n v. Brannon, 86 Mont. 200, 283 P. 202 (1929). The Court found that, because of the Board's dependence on the legislature, it was simply another agency of the state government and a part of the executive department subject to legislative control. *See id.* at 209, 283 P. at 208.

105. *See* Chenette, *supra* note 42, at 344-45; Herrin v. Erickson, 90 Mont. 259, 2 P.2d 296 (1931).

106. *See* Chenette, *supra* note 42, at 347. 1930-31 public higher education expenditures per student were 13 percent less than 1915-16. *See id.* at 348.

were so precarious. The Board was forced to hire an internal faculty member candidate over intense objection by faculty colleagues regarding his modest qualifications. The Board also failed to attract any external candidate to replace the Bozeman campus President for similar financial reasons.[107]

The national depression did help Montana campuses meet some physical plant needs when WPA and Public Works Administration (PWA) constructed several new buildings. However, the depression so demoralized the state that it continued to harm the campuses for three years after it ended in 1936. The 1937 Legislature did not believe that the drought had really ended and refused to increase appropriations for the 1937-1939 biennium even though campus budgets had been stagnant since 1923 while enrollments had nearly doubled.[108] The Legislature, Board and Governor also continued their state governance feud during these years concerning the chancellor position. The Legislature passed a bill abolishing the chancellor position in response to Chancellor Brannon's public criticism of the Legislature's refusal to fund the campuses. The Governor then vetoed the bill after Chancellor Brannon agreed to resign. Finally, the Board decided to abolish the office administratively by replacing it with an Executive Secretary having limited power.[109]

4. Faculty Repression Returns in the Late 1930s

In 1936 and 1939, after a long hiatus and while the depression was winding down, the Board revived its censorship and personnel harassment activity. The Board first adopted a rule requiring "proper standards" in the selection, purchase, distribution, and use of all books, periodicals, and plays on the campuses. This rule also required that Presidents be involved in "proper coordination" of any events. A year later the Board began firing faculty based on violation of this new rule and general public criticism of the Board.[110]

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107. *See id.* at 354.

108. *See Id.* at 304.

109. *See id.* at 351.

110. A year later, the Board fired Philip Keeney, a University of Montana librarian and tenured faculty member, at the request of President Simmons because Dr. Keeney had allegedly violated this rule, and had openly opposed the Simmons selection as President. Dr. Keeney proved wrongful termination and won his reinstatement in court. *See id.* at 356-58; State *ex rel.* Keeney v. Ayers, 108 Mont. 547, 92 P.2d 306 (1939).

When the chair of the Geology Department made public objection to President

The Board actions discussed above triggered outcries of protest in the state and nation. "Public indignation . . . was immediate. Newspaper editors were predicting dire consequences as the result of the action of the board—a decrease in enrollment, financial support and the influence of the University."[111] The AAUP investigated these events and expressed doubts about whether either President Simmons or the Board would be capable of understanding their gravity, especially when President Simmons wrote that he had "no intention in the future of permitting . . . anyone . . . to engage in deliberative activities of troublemaking or interference with the administration of this institution and standing idly by while such activities occur."[112]

Concerned with the University of Montana's tarnished national reputation, Montana United States Senator, Burton Wheeler, wrote President Simmons and the Board in October 1939 to ask for an explanation of the situation and to voice his endorsement of AAUP academic freedom principles in Montana.[113] Neither the AAUP's warnings nor Senator Wheeler's concerns appeared to have effect on President Simmons or the Board. However, official AAUP censure in late 1939 did evoke a response by the Board.[114] The Board responded to AAUP cen-

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Simmons' overall conduct, the Board revoked his tenure based on his age and tried to force retirement.

It next tried to fire a senior administrator who had been acting President (and a rival for the permanent job filled by Dr. Simmons) for alleged assault of a female employee, despite the fact that a court exonerated him of all charges. Finally, a Board Committee cited five senior University of Montana faculty members as "disloyal" to President Simmons and recommended their firing (including Dr. Keeney, in apparent violation of a court order). *See* Chenette, *supra* note 42, at 354-63.

These actions were apparently done pursuant to a 1937 law giving Montana's Governor sweeping authority to remove most state employees from their positions, with or without cause. *See Academic Freedom and Tenure-Montana State University*, 24 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN 321, 322 (Apr. 1938) [hereinafter *Academic Freedom I*].

111. Chenette, *supra* note 42, at 364.

112. *Academic Freedom I*, *supra* note 110, at 348.

113. "It is important that Montana shall rank among the institutions which, especially during the present emergency, must be relied on to act as the guardians of civil liberties, of academic freedom and of the precious heritage of due process." *Concerning Montana State University*, 25 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN 579, 583 (Dec. 1939).

114. AAUP found that "administrative policies affecting academic freedom and tenure and faculty-administrative relations are such as to justify censuring by this Association." *Academic Freedom and Tenure-Montana State University*, 26 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN 73, 90 (Feb. 1940) [hereinafter *Academic Freedom II*]. AAUP further found:

> There is evidence tending to show an undue influence exercised over University affairs by Missoula business interests, that President Simmons owed

sure by holding a hearing at the Missoula campus in January 1940. At least half the University faculty urged the Board not to fire their colleagues, and most of them sharply criticized President Simmons. The Board agreed not to terminate any faculty, but it formally "instructed" all faculty to respect President Simmons' authority: "to refrain from public statements which might arouse controversy, and to make any complaints or accusations they had to make to the local executive board."[115] The AAUP found these actions inadequate and continued censure.[116] Thus, the 1930s ended with Montana public campuses trying to recover from fiscal and political chaos.

5. *Governance Reforms Slowly Begin: 1939-72*

The year 1939 ended not only with AAUP censure, but also with the Montana Taxpayers Association excoriation of the state over its poorly funded public higher education. These developments began focusing state attention on how to improve higher education quality through meaningful governance reform. In 1942, the Governor persuaded his fellow Board members to fire President Simmons. The firing occurred without public outcry or charges of political interference, in the midst of reaction to a 1941 legislative study which found almost everything wrong with Montana's public campuses. During the 1940s the Board wavered between recreating and abolishing the chancellor position.[117] A 1944 Higher Education Commission called for a con-

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> his . . . presidency to that group . . . . There was also evidence of a widespread distrust among the faculty of President Simmons . . . a somewhat far-reaching belief that President Simmons has not displayed and does not possess the qualities requisite for the president of an institution of higher learning.

Id. at 89.

115. *Academic Freedom and Tenure-Montana State University*, 26 AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS BULLETIN 602 (Dec. 1940) [hereinafter *Academic Freedom III*]; *see also* Chenette, *supra* note 42, at 364.

116. AAUP concluded that "until past injustices have been rectified, and until experience demonstrates that members of the faculty . . . are free to disagree with the President on matters of university policy without jeopardizing their positions . . . the administration of the University should be continued on the Association's list of censured administrations." *Academic Freedom III*, *supra* note 115, at 606.

"Concerning the Board's reference to the unfavorable publicity the University has received in recent years, it should be kept in mind that this publicity was not of the faculty's seeking, although the [Board] report places responsibility for this publicity on the faculty. The Board itself created a large amount of unfavorable publicity by its request . . . for the resignations of five professors." *Id.*

117. Meanwhile, University of Montana President Melby assumed the Chancellorship in 1943 and quit a year later because the office lacked any legal power.

stitutionally autonomous higher education governing board and the closing of one or more campuses for financial reasons. However, the legislature did not agree with either proposal and blocked modest Board attempts to eliminate program duplication.[118]

After the end of World War II, the need for governance changes became more pressing as campus enrollment mushroomed beyond the Board's ability to manage and fund it. Voters approved a large mill levy increase in 1948, and real improvements seemed imminent. Unfortunately, the 1948 elections created three new elected official positions on the Board of Examiners which effectively impeded progress for three years as the Governor and Board of Education fought with no success against the Attorney General and Secretary of State over where and how to spend higher education construction funds.[119] This stalemate brought the newly created Northwest Association to Montana for its first accreditation trip, during which the Association criticized the Board for its inability to resolve its own differences for the benefit of the state's educational system.[120]

Frustrated with the two Boards' inability to resolve their fiscal differences, the 1951 Legislature chose to side with the State Board of Education and gave it sole authority to administer public higher education spending.[121] However, the legislature was concerned that this Board of Education might become too powerful; as a result, the legislature zero-funded the chancellor's office in the appropriations bill.[122]

Thus, conditions remained unchanged from the previous decade. "The University System was again racked by internal strife, the State Board of Education was under criticism by education associations, and the chancellor's office in limbo. In ten

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118. *See* Chenette, *supra* note 42, at 365, 374-406.

119. The latter two elected officials used their offices to steer these funds to the Havre and Billings campuses; and when Havre's President publicly supported them the Board of Education apparently fired him for it in 1950.

120. *See* Chenette, *supra* note 42 at 374-434. The State Superintendent of Public Instruction also expressed serious concern to her State Board of Education member colleagues about the many disparaging comments she was hearing at national educator meetings over the Havre President firing without any prior hearing.

121. A state district court upheld the new law's validity soon after its enactment.

122. *See* Chenette, *supra* note 42 at 434-36. Readers interested in the tortured legal and political history of Montana's Chancellor position should also *see* H. M. Seel, The Effect of the 1972 Constitution on the Administration of Higher Education in Montana 13-22 (1982) (unpublished MPA thesis, University of Montana) (on file with the University of Montana Library).

years . . . nothing had really changed."[123]

The 1950s witnessed few changes from the prior decade. The Board finally decided to hire an Executive Secretary with limited powers rather than a Chancellor. (This statute was later formally abolished by statute). Dissatisfied members of the Board of Examiners briefly blocked all public campus out-of-state travel funds in 1952, but the Governor lifted this. In 1956, the Board faced its worst financial crisis since the depression because of rapidly rising enrollments and responded by making the largest tuition and fee increase in state history.

In 1958, the American Legion demanded that the Board select and censor all campus speakers to allow only pro-American speakers. However, for the first time, the Board refused to adopt the policy.[124] Also, in 1958, the Board learned how to resolve campus fiscal crises solely by raising student tuition and fees. This in turn caused University of Montana President McFarland to resign rather than be fired for refusing to fund raises for some faculty members by terminating first year instructors.[125]

A significant governance development occurred in 1958 when a University of Utah expert recommended a separate Board of Regents for public higher education with either corporate or constitutionally autonomous status. Although the Montana system of higher education may have been "the most studied in the nation," (by this time almost a dozen recommendations had been ignored by the Board and the legislature) the 1959 Legislature took notice and heeded the suggestions of the Durham Report. The Legislature passed a proposed constitutional amendment to create a separate Board of Regents (albeit subject solely to powers set by statute). However, the Governor refused to sign it and the Montana Supreme Court kept the measure off the 1960 ballot for this reason.[126]

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123. Chenette, *supra* note 42, at 436.

124. *See Id.* at 437-65.

125. *See id.* at 470.

126. *See id.* at 471-77; State *ex rel.* Livingstone v. Murray, 137 Mont. 557, 354 P.2d 552 (1960); Schaefer, *supra* note 45, at 193; Laurance R. Waldoch, *Constitutional Control of the Montana University System: A Proposed Revision*, 33 MONT. L. REV. 76 (1971).

The sole surviving remnant of this legal and political fiasco was a 1959 "stopgap" statute adding a "Board of Regents" title to the same State Board of Education, with no new powers or members. Seel, *supra* note 122, at 25.

The Durham Report did not go unheeded, however, since it ultimately served as a basis for creation of today's Board of Regents in 1972.

Relatively little has been written about Montana's public higher education governance by the Board of Education during the 1960s. Thus, one can only assume there was a general absence of conflicts like those described above. However, the Board refused to give the Executive Secretary any significant authority despite a legislative recommendation that it do so, perhaps because of reluctance to revive any chancellorship controversy.[127] The 1960s apparently saw few changes from the 1950s, at least from a Board governance perspective. However, the Board's weak legal and political powers continued to impair the Board's ability to find adequate funding for public higher education. Thus the eighty-three tumultuous years of Board governance began winding down with little fanfare. The effect of this troubled period on Montana's public higher education continued to be deeply felt by the citizens of Montana.[128] The freshness of this distress formed the basis for why Montana's 1972 Constitutional Convention framers, and ultimately Montana's citizens, so eagerly embraced change.

B. The 1972 Constitutional Convention: A Mandate for Change

> The exact legal status with which to clothe higher education in Montana was debated extensively and thoroughly in the sessions of the . . . [1972] Constitutional Convention. That substantial and far reaching changes were intended is evident even from a casual comparison between the old and the new constitution. The debate in the . . . Convention reflected the ongoing national debate over the structure of higher education in American educational history.[129]

When the debate in Montana ended, the framers had decided:

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127. Seel, *supra* note 122 at 29.

128. Dr. Chenette makes two noteworthy observations about Board impact on the state:

> The Board's predilection for summary dismissals and adoption of policies which suppressed academic freedom . . . must have led many professors to decide to teach elsewhere other than in Montana, and discouraged much scholarly research, speech, and publication. Such repressive measures must also have kept many outstanding individuals from seeking employment in the Montana University System.

Chenette, *supra* note 42, at 484. In addition, the Board's dual responsibility for elementary, secondary and higher education "has positively been to the detriment of the Board's effective administration of the University System. *The Board has been unable to devote the time it should to University affairs.*" *Id.* at 487 (emphasis added).

129. Schaefer, *supra* note 45, at 190.

"Full power of responsibility and authority to supervise, coordinate, manage and control [Montana's public universities] . . . is vested in the Board of Regents" as a constitutionally independent entity free from most legislative control.[130] The framers also resolved the chancellor debate decisively in favor of a strong statewide administrator by empowering the new Board of Regents to appoint a Commissioner of Higher Education as a constitutional officer.[131] Why the framers did so bears careful scrutiny here.

After the framers assessed various governance options, the framers concluded that "direct legislative control under the old system had proven unworkable. There was a need for autonomy and relief from state administrative bureaucracy."[132] They also determined that:

> Higher education is not simply another state service; the administrative structure of higher education cannot be considered an ordinary state agency. The unique character of the college and university stands apart from the business-as-usual of the state. Higher learning and research is a sensitive area which requires a particular kind of protection not matched in other administrative functions of the state.[133]

The framers debated and rejected the proposal that a single board be granted responsibility for governing all Montana public education. In so doing, they recognized the need for effective coordination at all levels of the state's myriad public education activity. In response, the framers created two state constitutional entities: a Board of Regents to govern higher education; and a separate Board of Public Education to govern elementary and secondary schools. The framers left the State Board of Education, comprised of both governing boards, to function as coordinator.[134] The Committee responsible for drafting this dual board structure specially noted that all states, except Montana and Idaho, had separate higher education governing boards not distracted by elementary and secondary education responsibilities.[135]

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130. MONT. CONST. art. X, § 9 (1972).

131. *See id.*; Schaefer, *supra* note 45, at 193-94; Seel, *supra* note 122, at 34.

132. Schaefer, *supra* note 45, at 194 (citing remarks from Constitutional Delegate Champoux, Chair of the Committee on Education and Public Lands which drafted the 1972 Board of Regents language).

133. COMMITTEE ON EDUCATION AND PUBLIC LANDS, MONTANA CONSTITUTIONAL CONVENTION, VIII TRANSCRIPTS 6283 (1972).

134. *See id.*

135. The Committee concluded that Montana should not continue with *status quo*

The 1972 Constitution framers reviewed scholarly studies written about United States public higher education governance and concluded that a Board of Regents model for Montana was free of both legislative and bureaucratic intrusions and thus accomplished the objectives suggested by the studies.[136] The Committee also advocated protection of Montana's public campuses from other state agencies, and expressly referenced academic expert arguments regarding the threat of "bureaucratic and political interference."[137] Finally, the Committee cited the Eisenhower Committee Report as authority for creating an independent Board of Regents in Montana free from other state agency interference.[138] In summary, the framers adopted positions reflected in other state governance models that supported board legal autonomy.

Another fundamental reason cited by the framers for a separate Board of Regents was protection of academic freedom.[139]

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because it was too hard for one board to do both effectively. *See* COMMITTEE ON EDUCATION AND PUBLIC LANDS, MONTANA CONSTITUTIONAL CONVENTION, II TRANSCRIPTS 736 (1972) [hereinafter II TRANSCRIPTS].

136. Addressing the legislative interference question, the Convention Education Committee reasoned: "The power to coordinate and operate the system of higher education is one which properly belongs to an informed board of regents who have the knowledge and ability to determine rationally the course of higher education . . . There is a clear need for a strong board of regents to make long range plans which are appropriate to the needs of higher education *and free from short term political whims*." COMMITTEE ON EDUCATION AND PUBLIC LANDS, MONTANA CONSTITUTIONAL CONVENTION, I TRANSCRIPTS 34 (1972).

137. The Committee stated: "[M]aintenance of the system of higher education free from unnecessary bureaucratic and political interference is important not only to a healthy academic atmosphere, but also to the administrative efficiency of the system of higher education." *Id.* (citing MOOS & ROURKE, *supra* note 32). The Committee also warned: "[A] more subtle kind of coercion has made its appearance . . . of the sort which is likely to become an even greater threat to the integrity of higher education in the future. . . the growing power of the centralized bureaucratic state." II TRANSCRIPTS, *supra* note 135, at 736.

138. The Committee stated:

> Research and instruction at the higher levels are not services for which specific conditions can be written in advance, and for which one seeks the lowest bidder. They are venture capital investments where one successful strike in a multitude either in the form of a new idea, or a trained individual capable of producing them may spell the difference between a forward-moving or retrograding nation.

II TRANSCRIPTS, *supra* note 135, at 738 (citing *The Efficiency of Freedom*, *supra* note 32; MOOS & ROURKE, *supra* note 32).

139. The framers noted:

> Few would dispute the vital importance of academic freedom to the process of higher learning. Such freedom is the essence of the American higher education system. The great movements of mankind have come out of the great modern schools, the modern university system, ever since the time of

Given Montana's tortured history and its reputation for suppressing academic freedom, these arguments carried special significance.

The framers ultimately chose Michigan's governance system as a model upon which to create an autonomous Board of Regents.[140] As demonstrated above, Michigan had perhaps the most constitutionally autonomous public higher education system in the country and has now served as the model for every other state with a similar governance structure.[141] Moreover, when the delegates debated this issue they rejected various proposed floor amendments aimed at weakening the Montana Board's autonomous powers, including amendments which would have restored legislative control over university system finances and administrative decision-making.[142] Montana voters confirmed the Convention decision by voter approval of the entire 1972 Constitution, and July 1973 witnessed the legal birth of the state's first autonomous governing board.

C. Regents Governance Since 1972: Some General Observations

Only one scholarly work has assessed Montana's Board of Regents since 1972, and its scope is relatively limited.[143] Dr. Seel concluded that as of 1983 "the original intention of the convention [to create an autonomous Board] has not been realized."[144] She criticized the Board for falling short of gaining

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> the Renaissance. And the greatest of these movements have come out of the schools . . . unfettered by controls that would tend to stifle them. Only in an atmosphere of independent . . . unfettered inquiry can an objective pursuit of knowledge be conducted which is unhindered by prejudice and vested interest. The great contributions to both scientific and humanistic learning which have emerged from American colleges and universities can be attributed in large part to the freedom traditionally enjoyed by the teachers and students at such institutions.

II TRANSCRIPTS, *supra* note 135, at 2053.

140. This was "copied from the Michigan Constitution and the Michigan system." Schaefer, *supra* note 45, at 198 (citing COMMITTEE ON EDUCATION AND PUBLIC LANDS, MONTANA CONSTITUTIONAL CONVENTION, IX TRANSCRIPTS 6473 (1972) [hereinafter IX TRANSCRIPTS]).

141. *See supra* notes 22-25 and (accompanying text).

142. *See* Schaefer, *supra* note 45, at 195-96 (citing IX TRANSCRIPTS, *supra* note 140, at 6532).

143. *See* Seel, *supra* note 122, at 70.

144. "Legislation passed after the constitution went into effect differed little from that . . . enacted before its ratification. In effect, the legislature was refusing to acknowledge the new authority and independence of the board and was continuing to concern itself with university matters over which it no longer had any jurisdiction." *Id.*

"the independence and authority intended for it by the framers of the constitution."[145] In addition, she criticized the various Commissioners "for assuming too much authority and for exercising it with little regard for the effect" their actions would have "on the administration of higher education as a whole."[146] Because her work only covered the Board's first 10 years of existence, some of its relevance today may be questioned. However, her argument that the legislature, with board consent and assistance, continued to pass bills outside the scope of what the 1972 framers intended, can be verified merely by cursory review of applicable Montana Code provisions.[147] However, this review reveals not a covert (or overt) legislative intent to restore pre-1972 years of absolute legislative power over the campuses, but rather a Board willingness to work in partnership with the Legislature in meeting state higher education concerns.

The lack of more recent scholarship regarding the Board does not translate into a lack of significance for its activities. Neither does it preclude some general observations here. The Board of Regents has successfully stabilized Montana's higher education system while at the same time eliminating significant political controversies (notwithstanding the C-30 debate) such as: those which drive so many Montanans to other states for university educations and those which caused faculty to work in fear, find other employment outside of Montana, or never come to Montana at all. Moreover, the Board has done so despite a lack of solid financial support for public higher education in Montana which has made Montana one of the country's most poorly funded public campuses.[148] Finally, the Board has governed the system free of criminal or ethical scandals.[149]

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145. *Id.*

146. *Id.*

147. *See infra* text accompanying notes 256-57.

148. Despite these fiscal shortcomings, however, the Montana University System has gained national respectability and its faculty now enjoy prominent status in their respective fields. The Board has also done a commendable job of managing the modest fiscal resources, as manifested by AAA ratings received on various Board bond issues over the past several years. The fiscal situation seems to be improving, as the Board has successfully encouraged campuses to supplement their modest state appropriations with funds from numerous other sources which now reflect some 70 percent of all System dollars.

149. For example, the 1994-97 controversies involving the Montana Board of Regents role in University System land sales and described herein resulted in a finding by the Montana Attorney General that: "[t]here is no evidence or suggestion of fraud or conflict of interest" in these transactions. MONTANA ATTORNEY GENERAL, REPORT TO THE STATE LAND BOARD, LEGAL ANALYSIS OF THE DISPOSITION OF PUBLIC

D. 1994 Government Reorganization Task Force: C-30's Genesis

Given all of these factors, C-30 seemed to be proposing radical changes unsupported by evidence that these changes were needed to correct serious problems. In fact, the genesis of C-30 was not a result of a real need, but rather a broad 1994 state government reform movement which gave little thought to the need for reform or the history of public campus governance in Montana. In 1994, Montana Governor Racicot formed the Task Force To Renew Montana Government and charged this Task Force to carefully study the entirety of state and local government in Montana and to recommend any needed or desirable changes.[150] The Task Force, assisted by a Committee of Montana Education experts, made a key recommendation after months of meetings and hearings, which served as the genesis for C-30. The Task Force recommendation was that Montana's Constitution should be amended to create: (1) a new Education Department, headed by a gubernatorially appointed Director; and (2) a new lay Commission on Education with no enumerated powers which would replace not only the Board of Regents, but also the Commissioner of Higher Education, the Superintendent of Public Instruction, and the Board of Public Education.[151] In support of this recommendation, the Task Force wrote:

> A matter of concern to many and confusion to most is the cumbersome combination of public offices and authorities which currently oversee Montana's public education system [referring to the Regents, Board of Public Education and Superintendent of Public Instruction].[152]

The Task Force also observed:

> The existing organizational structure is not conducive to coordinated management of kindergarten through graduate school education. The responsibility for implementation of education

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LANDS BY THE MONTANA UNIVERSITY SYSTEM (Apr. 15, 1996). Moreover, Montana's Governor found "a general sense that . . . the spirit of the law was complied with, if not the letter, and to the extent there may be questions about value, in most of the cases the amounts would be so insignificant as to not [be worth the] litigation to try to fight over issues of fair market value." MONTANA STATE LAND BOARD, MINUTES, (Sept. 16, 1996). *See* discussion *infra* Part VIII.B.

150. *See* THE GOVERNOR'S TASK FORCE TO RENEW MONTANA GOVERNMENT, PREPARING FOR A NEW CENTURY: FINAL RECOMMENDATIONS (Oct. 1994) [hereinafter PREPARING].

151. *See id.* at 15.

152. *Id.*

> policy is fragmented and compromised due to the competing perspectives of the Board of Public Education, Superintendent of Public Instruction, Board of Regents, the Commissioner of Higher Education and the Governor.[153]

It further observed that State Board of Education (comprised of the Regents and Board of Public Education) had never satisfied its mandate to coordinate and evaluate Montana's public education policies and programs at all levels.[154] The Task Force recommended new Education Department and Commission objectives which included provisions for:

> Coordination of Montana public education from kindergarten through graduate school, and providing management of a seamless education system.
>
> Provision of a more cohesive executive level structure for Montana public education at all levels.
>
> Provision of more educational budget integration.
>
> Separation of education policy from partisan politics.[155]

In other words, the Task Force proposed that Montana return to a single board (the Education Commission), with a single new state constitutional official (the Education Department Director), having responsibility for all Montana public education.

This proposed structure would have essentially returned the state to the time when this same structure failed the state. Montana's 1889 Constitutional Convention disregarded the earlier territorial constitution's proposed separate Board of Regents because the 1889 delegates believed that with one Board that dealt with all levels of education a greater degree of unity and coordination would be achieved.[156] Scholars and political leaders alike found that by 1972, dual State Board of Education responsibility for higher education, elementary and secondary schools had been to the detriment of the Board's effective administration of the university system.[157] As indicated above, the 1972 Constitutional framers also found that elementary and

153. *Id.*
154. *See id.*
155. *Id.*
156. Chenette, *supra* note 42, at 481.
157. *Id.* at 487 (emphasis added).

secondary education fared somewhat poorly under State Board of Education governance for the same reasons. Because a single board had already proved unable to meet state educational needs, it is hard to see how a gubernatorially appointed Education Department Director, with the same diffused responsibilities would fare any better. It is also dubious that an Education Department Director, whose position depends solely on a governor chosen by partisan election, can meet the Task Force goal of separating education policy from partisan politics.[158]

The Task Force recommendation was only partially accepted in the legislature. House Bill 229, which was the basis of C-30 and appeared to eliminate the Board of Regents and create the Education Commission and Department by constitutional amendment, was passed, but House Bill 228, which abolished the Board of Public Education and Superintendency of Public Instruction by constitutional amendment, was not.[159] Thus, Montana voters faced a C-30 ballot choice that included only the option of returning to a higher education governance system and left Montana's campuses to the mercies of a politically weak Board subject to total legislative control, without even the benefit of the education coordination objectives identified by the 1994 Task Force. Voters rejected this option in favor of the status quo.

Even if Montana voters had not had the lesson of Montana's history, the public policy arguments and authorities which support and refute the merits of constitutionally autonomous public higher education governing boards support the decision made by the voters. As described above, no state has a higher education governance system resembling what C-30 was proposing. As illustrated below, no state should ever desire to adopt one.

IV. ARGUMENTS FOR AND AGAINST CONSTITUTIONALLY AUTONOMOUS BOARDS

The history of United States public higher education combined with current state public higher education laws reveals

158. *See* PREPARING, *supra* note 150.

159. Article XIV, Section 8, of the Montana Constitution requires that two-thirds, or 100 of Montana's 150 legislators, approve a proposed constitutional amendment by legislative referendum. House Bill 229 passed the 1995 House by a 67-33 margin on January 26; passed the Senate in amended form by a 29-21 margin on March 2; and passed the House on March 9 by a 71-29 vote, the minimum 100 legislators needed. MONTANA HOUSE OF REPRESENTATIVES, JOURNAL (Jan. 26, 1995; March 9, 1995); MONTANA SENATE, JOURNAL (March 2, 1995). House Bill 228 passed the House by a 62-38 margin on February 13, but was killed in Senate Committee on March 16. MONTANA HOUSE OF REPRESENTATIVES, JOURNAL (Feb. 13, 1995).

broad divergence among the states with regard to their public higher education governing boards. Only a minority of states have chosen autonomous boards like Montana's, while most states favor state legislative power to define permissible public campus activity. It is therefore reasonable to question the importance of autonomy in Montana. A review of legal and policy issues related to governing board autonomy in general can perhaps address questions that may be raised should Montanans face the autonomy issue again in future elections.

A. Arguments Favoring Increased Autonomy

1. Elected Official Inexpertness/Politicization

The Carnegie Commission advocated more public higher education independence from state government oversight and reasoned that "public higher education is a function of society rather than of government, that colleges and universities perform most effectively and efficiently when control rests with the university system, and that academic and administrative freedom are essential to the future of higher education."[160] The scope of autonomy generally advocated by proponents includes exclusive board or institutional administration authority delegated by the board over all of the following: (1) specific system and campus budget expenditures and allocations, subject to post-audit review; (2) employee work assignments; (3) employee compensation and promotion decisions and criteria; (4) employee hiring; (5) curriculum, degree program and course approval; (6) academic freedom policies and protections; (7) enrollment and new campus growth decisions; and (8) research and service definitions and administrative policies.[161] The Michigan Legisla-

160. Beckham Dissertation, *supra* note 5, at 2 (citing CARNEGIE COMMISSION, *supra* note 35, at 20-24).

161. *See* Beckham Dissertation, *supra* note 5, at 148-49; CARNEGIE COMMISSION, *supra* note 35, at 17-18. Autonomy advocates have identified various arguments against leaving the above types of decisions to state legislative bodies:

> Legislatures, made up of varied personnel and subject to frequent and violent changes in composition according to the fluctuating political fortunes of parties and individuals, and convening for short and crowded sessions . . . cannot give the continuous study and wholehearted devotion which is required to the development of a wise educational policy for the state . . . . [F]ew if any members are likely to have had any experience in the study of the problems of higher educational administration, and many of them will possess but slight comprehension or any sympathy with the aims and methods of the academic and scientific teaching and research.

ture adopted such reasoning nearly 150 years ago when it chose a constitutionally autonomous board instead of trying to govern that state's first public university. This effectively created perhaps the best quality United States public higher education systems and institutions in the nineteenth century.

In addition to concerns about whether legislative officials can effectively make important public higher education policy decisions, autonomy proponents also cite fears of politicizing the campuses. A survey of 1,400 higher education leaders from all over the United States revealed that the most highly rated campuses from an administrative effectiveness standpoint were those affording the greatest campus protection from outside political authorities.[162] Material shifts in academic decision-making authority from a state's public governing board to its political officials seems to almost guarantee more political criteria will be used to guide this authority than desirable educational values.

Beckham, *supra* note 5, at 147 (citing E. C. ELLIOTT & M. M. CHAMBERS, THE COLLEGES AND THE COURTS 509 (1936)).

> Dr. Eykamp's public higher education quality study observes:
> [S]hort term gains available for politicians, in terms of avoiding higher taxes or shifting money to activities with higher profiles for which they can claim credit, provide a strong set of incentives for raiding the university's budget . . . . If financial reductions with long term impact are gradual, even constituent groups in the university may be unaware of the accumulating magnitude of the change.

Eykamp, *supra* note 27, at 99.

162. "The politicization of the college or university is a serious and unresolved problem or series of problems. It can come from the selection . . . of ideological radicals on a board (right or left) . . . . It can also originate in the use of the board by the governor as a political platform . . . . The general experience is that academic life, with its emphasis on the rational, on tolerance, and on the measured examination of what is true, does not mix well with the passionate and urgent advancement of what some member of the community considers to be 'for the good' in the political arena." C. KERR & M. GADE, ASSOCIATION OF GOVERNING BOARDS, THE GUARDIANS: BOARDS OF TRUSTEES OF AMERICAN COLLEGES AND UNIVERSITIES: WHAT THEY DO AND HOW WELL THEY DO IT 89-90 (1989). ECS recently wrote: "State higher education leadership is the most complex, difficult balancing act in state government. There are no simple answers, no absolutes. While lessons can be drawn from other states, there is no perfect model. Conflicts are the reality. The challenge is to resolve these conflicts as close to the operating level (e.g., at the campus level or through cooperation among campuses) and as close to the real problems as possible. *Once issues rise to the level of the governor and legislature, political as opposed to educational values tend to dominate the debate.*" HANDBOOK, *supra* note 6, at 40 (emphasis added).

2. State Bureaucratic Agency Intrusion Concerns

In the mid-twentieth century, United States higher education leaders had serious concerns about the adverse effects of increased state administrative agency interference in campus activity. A 1952 national level commission appointed by President Truman criticized state government for centralizing the impact on higher education, "particularly where standardization of practices and uniformity of methods were being superimposed on the public higher education system."[163] The 1959 Eisenhower Commission also expressed grave concerns about this problem when it documented numerous bureaucratic intrusions and concluded that these intrusions threatened the power of educational policy making.[164] A number of individual states identified these problems during the 1980s and, in virtually all cases, resolved these problems by creating laws which granted public governing boards much more autonomy and created statutory exemptions from the regulatory requirements of other state agencies.[165]

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163. Beckham Dissertation, *supra* note 5, at 145 (citing COMMISSION ON FINANCING HIGHER EDUCATION, NATURE AND NEEDS OF HIGHER EDUCATION 56 (1952).

164. *Id.* at 145-46 (citing THE EFFICIENCY OF FREEDOM, *supra* note 32, at 7). Echoing Committee findings, other experts stated:

> Perhaps the greatest threat to the state higher education system . . . is the bureaucratic intrusion which received stimulus from delegations of power by legislature or executive. Universities . . . must therefore maintain full intellectual independence and autonomy . . . . The threat of government control has to be guarded against. But the significant threat is the impalpable influence of government. The resources of government are so great that the universities in their growth and in their direction may lose the power or the will to be self-determining.

Beckham, Dissertation, *supra* note 5, at 147-48 (citing Frankel, *Issues in Higher Education, in* HIGHER EDUCATION AND PUBLIC INTERNATIONAL SERVICE 41 (E. N. Shriver ed., 1967).

Examples of agency intrusion deemed harmful by experts, virtually all resulting from statutes enacted in states without constitutionally autonomous boards, include pre-audit controls on higher education expenditures; rigid purchasing rules; inflexible personnel regulations insensitive to unique campus skills needs; and antiquated public works construction policies which increase cost and delay in essential campus facilities. *See, e.g.*, Eykamp, *supra* note 27, at 23-24.

165. Eykamp, *supra* note 27, at 24-27 (citing Hawaii, which had to grant the University of Hawaii fiscal autonomy to avert accreditation loss; New Jersey and Kentucky, which exempted public campuses from fiscal controls and civil service requirements imposed on other state agencies; New York, which found SUNY "the most overregulated university [system] in the nation" and granted numerous statutory exemptions from other state agency rules; Colorado, which reduced legislative and agency controls over public campus budgets; and Maryland, which increased fiscal autonomy for its public campuses and exempted most of them from state purchasing regulations). In his book assessing linkages between public higher education and autonomy, Dr. Newman interviewed numerous governors and state legislative leaders,

3. *Intellectual and Academic Freedom*

The previous arguments against legislative decision-making, politicization and bureaucratic intrusion into campus governance all reflect a common notion that unfettered any of these factors can curtail intellectual and academic freedom on campus. Commentators and courts alike have unequivocally endorsed freedom in United States public higher education and board legal autonomy as the means of protecting academic freedom.[166] (Likewise, United States Administrations have protected freedom in higher education).[167]

The United States Supreme Court has forcefully defended the need for academic freedom by striking down state legislation and contradicting attorney general opinions which subjected

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one of whom explained the necessity for more autonomy:

> A university is not just like any other government agency. It is part of an international community. Its mission is not focused on the state *per se*, but on the pursuit, discovery, and transmission of knowledge. The harsh fact is that our state government has forgotten that there are no great universities run by government or budget analysts or legislators. There are no great centers of learning that are forced to submit to the open mistrust and control that we think are appropriate in this state.

Id. at 57 (citing Governor Kean interview in F. NEWMAN, CHOOSING QUALITY: REDUCING CONFLICT BETWEEN THE STATE AND THE UNIVERSITY 8-9 (1987).

Most autonomy advocates would probably share two experts' view that "state government in relation to public institutions should limit itself to budgets based on broad general formulas versus line items, to missions . . . and to review of campus performances." KERR & GADE, *supra* note 162, at 121.

166. In reaching this conclusion the Carnegie Commission observed: "No Holy Writ gives higher education a right to reasonable independence for institutional actions. No natural law confers upon it escape from public surveillance. The case for . . . independence must be made with reasonable arguments." CARNEGIE COMMISSION, *supra* note 35, at 22-24. The Commission further noted:

> The case for a reasonable independence from state government interference rests on the historical tradition of autonomous colleges and universities and on the professional nature of many of the decisions that must be made, on the need to elicit the devotion and sense of responsibility of the major groups internally involved, on the wisdom of drawing advice and support from interested private citizens, on the costs of partisan political and bureaucratic intrusions . . . and on *the experience of history on what works best both academically and politically.*

Id.

167. In the midst of political protests on campuses against Vietnam and other political actions, the Nixon Administration, although not generally sympathetic to such campus activity, acknowledged "the need for independence among higher education institutions in order that . . . [they] may flexibly respond to the public's postsecondary education needs." Beckham Dissertation, *supra* note 5, at 146 (citing Assembly on University Goals and Governance, *First Report* (1971); and the U.S. Office of Higher Education Task Force of Higher Education, *Report on Higher Education* (1971)).

state public campus educators to loyalty litmus tests as conditions for remaining employed. In *Sweezy v. New Hampshire* the United States Supreme Court made a strong statement against such litmus tests:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy . . . played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation.[168]

4. *Arguments Favoring Constitutionally Autonomous Lay Boards*

Those who oppose political and bureaucratic interference with public campus decision-making by arguing that this interference is contrary to essential academic freedom believe that the best structure for effectively resolving these concerns is the constitutionally autonomous lay board. One expert has written: "States must create [public campus governance] structures that grant as much autonomy and fiscal flexibility as possible, conferring sufficient authority on leaders while clearly expecting accountability."[169] Another expert notes that long-term autonomous lay boards insulated from prevailing political winds are far less likely to "cheat the future" on fiscal decisions since long term prestige and responsibility factors tend to influence such boards' behavior.[170] Others believe that the long term health of United States public higher education requires the educational system to be "as privatized and as autonomous as possible under influential lay trustee control."[171]

One comprehensive economic study on United States public higher education governance found that constitutionally autonomous campuses and systems are necessarily less regulated by their state governments. This modest regulation results in lower administrative costs, greater productivity, less dependence on state appropriated dollars and better fund-raising from non-state

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168. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (Warren, C.J., concurring).

169. Novak, *supra* note 33, at 41.

170. Eykamp, *supra* note 27, at 101.

171. KERR & GADE, *supra* note 162, at 126. They support these contentions as follows: "All this is based on the conviction that a system of higher education based on autonomy . . . will perform better . . . . One proof of this is the historical experience of the American system versus all others around the world." *Id.* at 127.

sources.[172] A recent assessment of state higher education governance reforms found that a viable state governance system requires "legal standing (in the state constitution, if appropriate) that will enable it to provide sustained, consistent, long-term policy leadership in the face of increasing turnover and turbulence in state political leadership."[173]

5. *Autonomous Board Accountability Safeguards*

Perhaps the most persuasive argument advanced by public board autonomy advocates is that these autonomous boards are still subject to a great degree of state government limitation and accountability despite their constitutional autonomy.[174] Autonomy proponents appear to make a compelling historical and sound public policy case. The primary counter-arguments, at least partly contrary to their position, are set forth below.

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172. *See* Reynolds, *supra* note 12, at 38-39 (analyzing J. FREDERICKS VOLKWEIN, STATE REGULATION AND CAMPUS AUTONOMY 141-43 (1987).

173. Aims C. McGuinness, Jr., *A Model for Successful Restructuring, in* RESTRUCTURING HIGHER EDUCATION, *supra* note 34, at 215 (emphasis added). Perhaps worth noting here is the fact that Dr. McGuinness served as ECS Policy Director for 18 years, is a leading scholar in the field of public higher education governance, and is a member of the Colorado Board of State Colleges recently appointed by Governor Romer.

> Dr. Beckham reasons in favor of constitutional autonomy:
>
> The advantage of placing broad constitutional powers exclusively in the hands of the higher education governing board is that such a board, chosen for long terms and reasonably independent of external state government control, is likely to exhibit the qualities of understanding and experience that will permit wise judgment in dealing with matters of educational policymaking. The lay governing board thus becomes the link between the higher education system and the society, preserving reasonable autonomy for the system and adapting the system to meet changing social needs.

Beckham Dissertation, *supra* note 5, at 149-50.

174. Dr. Beckham observes:

> [A] constitutionally autonomous higher education system could not abridge rights protected by the federal or state constitution, and would be subject to state legislation enforcing state-wide standards for public welfare, health and safety . . . . Ultimately, all constitutionally autonomous higher education systems are subject to some degree of state government limitation.

Beckham Dissertation, *supra* note 5, at vii, 151.

> The Carnegie Commission, while praising maximum autonomy, wrote:
>
> Autonomy, in the sense of full self-governance, does not now exist for American higher education, nor has it existed for a very long time, if ever. Autonomy is limited by the law, by the necessary influences and controls that go along with financial support, and by public policy in areas of substantial public policy concern. Autonomy in these areas is neither possible nor generally desirable.

CARNEGIE COMMISSION, *supra* note 35, at 17.

B. Arguments Favoring Less Autonomy

In contrast to the volume of articles and studies which speak in favor of public higher education board autonomy is the lack of commentary which directly opposes or questions the board autonomy position. Those who challenge autonomy in general, or autonomy in excess, do so subtly when they cite frustrations with the higher education status quo or urge that public higher education have more sensitivity to overall state policy needs. Additional challenges are made on the basis that constitutional or broad statutory autonomy may not be necessary in order to protect academic freedom.

1. Frustration With Public Higher Education's Inability to Solve Problems Effectively or Make Needed Changes

Elected political officials (including those in Montana who supported C-30) do not warmly embrace the pro-autonomy arguments because they are frustrated with the perceived inability of public higher education to resolve long-standing problems.[175] Primary causes for this frustration include the following: (1) the increase in state costs, including the increased cost for public higher education, with a corresponding cut in federal matching funds;[176] (2) the changing political climate in most states as legislators oppose new or increased taxes to pay for social services, including public higher education; (3) state government reinvention and reduction, which often poses the greatest difficulty for the structure and growth of public systems and campuses; (4) ongoing, self-generated public campus and system restructuring which is frequently not justified by any noticeable substantial program improvement or cost savings; and (5) erosion of public confidence in higher education arising from news controversies.[177] Autonomous (and even less autonomous) governing

175. "As we move into the latter half of the 1990's and prepare for the twenty-first century, the relationship of public higher education to state government appears to be more uncertain and in greater flux than ever before." Novak, *supra* note 33, at 27.

176. This describes the changed fiscal climate in most states now. States are facing costly new program needs in areas such as medicaid and prisons with fewer federal matching funds available to help meet them, at a time when public higher education costs also keep rising for states and students alike.

177. These controversies include sports cheating, indirect research cost abuses, antitrust price-fixing suits involving campuses on a national level plus individual state scandals such as the one involving criminal corruption convictions of various Texas A & M governing board members and high level administrators. *See* Novak,

boards tend to bear the brunt of all of these criticisms.

2. The Need for More State Involvement in Higher Education Decision-making on Public Policy Grounds

Commentators have articulated seemingly sound reasons for more state government involvement in public system and campus activity at board expense. These arguments are based on the desires of governors and legislative leaders to play greater roles in formulating essential state public higher education policies. Dr. Newman states that these views "stem from legislative frustration over institutional accountability to the state, responsiveness to public or political demands, or a perceived disregard for satisfaction of student 'customers.'"[178] Collective state officials' frustration and inability over how to do so undoubtedly contributes to their anti-autonomy sentiment.

Dr. Reynolds also describes a number of objections that state elected officials have to public board autonomy. He cites as the most common of these the argument that "the nature and scope of all of higher education is a matter of public policy, and therefore should be the responsibility of the governor and the legislature."[179] Autonomy opponents further believe that "[c]omplete autonomy . . . ignores the legitimate interest of the public which the university is meant to serve."[180] Those urging more state government control over their campuses do so on the assumptions that: (a) because the state plays a major role in funding

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supra note 33, at 27-28; Bruce Tomaso, *'96 Tears . . . and Laughs*, DALLAS MORNING NEWS, Dec. 29, 1996, at 43A. *See also* Paul Burka, *Behind the Lines: Not Guilty*, TEXAS MONTHLY, Apr. 1997, at 7 (analyzing the Texas A & M scandal).

178. Novak, *supra* note 33, at 39.

Dr. Newman writes:

> The state role is essential. Not only is the state an essential force for accountability and for the assurance that the university will meet the public interest, but it is clear from the history of American higher education that external forces are essential to encourage change within the university. Often, the most important changes have come about because of state or federal action. We need, therefore, a strong but appropriate role.

NEWMAN, *supra* note 165, at 11. Finally, he notes:

> Although a significant degree of independence is essential, a constructive relationship recognizes the need for a system of checks and balances . . . . The [public] university . . . needs the involvement of the state as a force for meeting the public's needs, as a force for change and as a force for accountability. The problem, therefore, is not to eliminate the state's role, but to perfect it.

Id. at 8.

179. Reynolds, *supra* note 12, at 29.

180. *Id.* at 30.

public campuses it is entitled to control other aspects as well; (b) public campus are "central to the life" of a state and nation and thus require greater public control; and (c) public campuses institutions are not really very unique when compared to other state agencies, and thus do not merit any special governance considerations.[181] One of Montana's principal constitutional autonomy advocates, whose 1971 work influenced the eventual creation of Montana's Board of Regents in 1972, acknowledged:

> Although the informal influence of legislators is subject to abuse, it can be very beneficial in terms of keeping regents and university administrators aware that legislators have a legitimate interest in university affairs and that legislators must be informed with regard to university affairs to properly determine the appropriate level of funds [for campuses].[182]

In other words, few seem to doubt that it is necessary and desirable for state political officials to be involved in public higher education policy formulation or decision-making. However, there is little consensus over the specifics of how this should be done.

3. Academic Freedom and Board Autonomy Separation

As already noted, principles of academic freedom protection have directly shaped autonomy proponent arguments and even provided much of their foundation. However, it is worth noting that not all proponents view autonomy as essential to meeting this need. The Carnegie Commission has written:

> [The argument] that academic freedom . . . depends on institutional independence has been sharply questioned by higher education experts generally supportive of such independence who have noted that academic freedom . . . can be substantial although the university is essentially an arm of the state. Nor has academic freedom . . . suffered because of the recent decline in campus independence . . . . [A]cademic freedom may exist in the absence of substantial campus independence if supported by the law and by public opinion.[183]

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181. *Id.* at 33. Moreover, Dr. Reynolds writes: "State legislators may perceive excess and waste in higher education. Waste is interpreted by state government as money spent on a program or on behalf of a principle that no longer holds high priority for the larger society. As a result, the state moves in with controls to reorder priorities." *Id.* at 34.

182. Waldoch, *supra* note 126, at 97.

183. CARNEGIE COMMISSION, *supra* note 35, at 22.

The federal courts, and increasing numbers of state courts, have affirmatively found constitutional protections against interference with public campus employee speech rights. In so doing, these courts recognize that faculty in particular "have considerable freedom to express themselves on public issues and, as private citizens, to associate with whom they please and engage in outside activities of their choice."[184] Those who are skeptical of this contemporary judicial willingness to protect free speech and academic freedom rights on campuses should simply review recent cases.[185] Although tenuous, the link these legal protections suggest between constitutional public board autonomy and constitutionally protected speech is evident.

C. Arguments Used During the C-30 Campaign

Before the election, Montana C-30 proponents and opponents advanced most of the arguments cited above to support their respective positions. The "No on 30 Committee," formed to oppose the measure, argued forcefully that C-30 would shift public higher education governance "from a citizen board whose authority comes from the constitution to a bureaucracy whose authority comes from the legislature."[186] The Committee made the following observations: (1) the Legislature's failure to adopt the 1994 Task Force proposal for a single public education governing board would cause less rather than more public education resource coordination; (2) the discretionary powers granted to the Legislature to make core higher education decisions were overly broad; and (3) creating a new education agency dependent on the Governor was but a new form of bureaucracy.[187]

C-30 proponents likened the Montana Board of Regents' power to set tuition and fees to a power of taxation without accountability. They argued that the elected officials on the Board had an excuse to avoid aggressive public campus cost-cutting.[188] Legislator proponents argued against what they saw as

184. W. KAPLIN & B. LEE, THE LAW OF HIGHER EDUCATION 328 (3d ed. 1995).

185. *See* Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996) (invalidating public campus sexual harassment policy used to punish certain classroom professor lectures); Gay Lesbian Bisexual Alliance v. Sessions, 917 F. Supp. 1548 (M.D. Ala. 1996) (invalidating Alabama state laws which barred gay rights advocates from speaking at public campuses).

186. The No on 30 Committee, 1 (May 23, 1996) (on file with author).

187. *See id.* at 2-4.

188. *See* Montana Governor's Budget Director Dave Lewis, *Make Regents Ac-*

a lack of gubernatorial and legislative control over university system budget policies, proposing that a governor and legislature would be more accountable to citizens than a lay board.[189] At the same time, these legislator proponents seemed to argue that the real problem of the lack of accountability resulted from the lack of one unified board responsible for all of Montana public education and directly dependent on the governor (a situation C-30 would not have remedied).[190]

The Montana C-30 public debate was limited. With only one exception, the debate relied solely on anecdotal Montana information and arguments rather than broad legal or policy arguments based on how Montana universities would compare with others states in the United States if C-30 were enacted.[191] Given C-30's large margin of defeat, opponents obviously did not need these latter arguments.

V. OTHER CONCERNS APPLICABLE TO NON-AUTONOMOUS PUBLIC BOARDS:ACCREDITATION, EDUCATION QUALITY AND LEGAL INSTABILITY

A. Accreditation Issues and Concerns Arising From Lack of Board Autonomy

The need for institutional accreditation by any state's public campuses is straightforward and unequivocal. Although the decision to seek accreditation remains the voluntary choice of each college and university, as a practical matter, accreditation is today a necessity for post-secondary institutions for two fundamental reasons: First, federal financial aid awards to institutions and students is usually contingent upon accreditation; Second, the reputation of an institution, and consequently its ability to operate successfully, can be adversely affected by lack of accreditation.[192]

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countable, GREAT FALLS TRIBUNE, Mar. 29, 1996 at A5.

189. *See* "For C-30" Statement by Montana Senator John Hertel and Montana Representative H. S. "Sonny" Hanson (undated). Hertel and Hanson sponsored House Bill 229 (which became C-30) in the 1995 Legislature.

190. *See id.*

191. An exception may have been this author's C-30 "White Paper" which circulated throughout Montana during the election and serves as the basis for this article. *See* David Aronofsky, Proposed Constitutional Amendment 30 To Eliminate The Montana Board Of Regents: An Analysis Within U.S. Public Higher Education Governance And Montana University System Historical Contexts (Oct. 1996) (unpublished manuscript, on file with author).

192. 1 JAMES A. RAPP, EDUCATION LAW 3-127 (1996). Institutional accreditation

Because public higher education accreditation is naturally institutional rather than systemwide, accreditation standards require that each institution within a state's system be governed by a legally autonomous lay board with prescribed decision-making powers which are not susceptible to constant change by a state's executive or legislative branch. Such boards can govern single institutions or entire state systems, but their legal powers must meet accreditation standards and requirements. These standards and requirements also safeguard academic freedoms on individual campuses by mandating that there be governing boards, empowered to provide and protect them from external political pressures.

Most public campuses have little difficulty obtaining or maintaining accreditation regardless of whether their governance structures enjoy constitutional or merely statutory status under their respective state laws. However, this accreditation status remains contingent upon legally autonomous lay boards (which cannot be overly dependent on state executive or legislative branch interference with board powers). As discussed more fully below, C-30 threatened creation of a successor to the Montana Board of Regents, the Commission on Education, which would be little more than a non-governing advisory arm to a gubernatorially appointed education department head serving at the discretionary pleasure of the governor. Such a scheme could well have jeopardized Montana's public university accreditation status. Moreover, the history of other state accreditation experiences (plus at least once in Montana) teaches that public boards can result in egregious political abuses posing serious accreditation problems. These accreditation concerns will require very close scrutiny if C-30 proponents try again for similar future public campus governing board changes.

1. Accreditation Requirements Applicable to Montana

The Northwest Association of Schools and Colleges of the Commission on Colleges (Northwest Association), which accredits all Montana postsecondary education institutions, appears to have standards and requirements typical of the other five United States regional accreditation associations.[193] Northwest Associ-

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should be distinguished from individual academic programs accreditation, since the latter would ostensibly be less affected by C-30's potential encroachment into public higher education board decision-making. Legal stability in today's complex U.S. higher education environment and litigious society seems increasingly absent.

193. "Institutional accreditation is granted by six regional agencies - membership

ation accreditation provisions related to issues of governance and autonomy mandate "a governing board which has the authority to carry out the mission of the institution . . . " and a campus with "a high degree of intellectual independence of its faculty and students. . . . "[194] Accreditation Standard VIII states: "The governing board should . . . act as a body politic, not be subject to pressures (state, political or religious) and should protect the institution from the same."[195] The Northwest Association reinforces its autonomy requirement by stating: "Relating to this general concern corresponding to intellectual and academic freedom are correlative responsibilities. On the part of the trustees and administrators, there is the obligation to protect faculty and students from inappropriate pressures or destructive harassments."[196] The Northwest Association also requires that institutions adhere to their principles and recognize a need for a governing board which recognizes its duty to the public and to protect the institution against outside influences.[197]

The Northwest Association likewise imposes explicit governing board fiscal powers on states as accreditation conditions.[198]

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associations composed of the accredited institutions in each region." KAPLIN & LEE, *supra* note 184, at 873. The Northwest Association includes all accredited higher education institutions in Alaska, Idaho, Montana, Nevada, Oregon, Utah and Washington. *See* NORTHWEST ASSOCIATION OF SCHOOLS AND COLLEGES, COMMISSION ON COLLEGES, ACCREDITATION HANDBOOK 2 (1994) [hereinafter ACCREDITATION HANDBOOK].

194. ACCREDITATION HANDBOOK, *supra* note 193, at 3, 7.

195. *Id.* at 73 (emphasis added). The Northwest Association explains in some detail how it applies these standards and requirements in assessing accreditation:

> The maintenance and exercise of . . . institutional integrity postulates and requires appropriate autonomy and freedom. Put positively, this is the freedom to examine data, to question assumptions, to be guided by evidence, to teach what one knows — to be a learner and a scholar. Put negatively, *this is a freedom from unwarranted harassment which hinders or prevents a . . . university from getting on with its essential work* . . . . A college or university is an institution of higher learning. *Those within it have as a first concern evidence and truth rather than particular judgments of institutional benefactors, concerns of churchmen, public opinion, social pressure, or political proscription.*

Id. at 126 (emphasis added).

196. *Id.* at 128. "All concerned with the good of the . . . universities will seek for ways to support their institutional integrity and the exercise of their appropriate autonomy and freedom. In particular, the regional commissions . . . will *always* give serious attention to this aspect and quality of institutional life so necessary for its well-being and vitality." *Id.* (emphasis added).

197. *Id.* at 131.

198. "The governing board . . . must control the institution's budget . . . . Unless the governing board has control of the budget, it cannot complete its planning function or ensure implementation of its plans." *Id.* at 134.

The Northwest Association explains the nature of public board fiscal powers as follows:

> When an institution depends for its support on an external [public] agency . . . the external agency will determine the amount of support it will provide and may appropriately indicate in broad terms the categories for which support is provided. . . . The external agency should not, through line items, control or other means, determine in detail how the funds are to be spent. This is a function of the governing board and the institution's officers.[199]

Such detailed board fiscal powers requirements appear on their face to limit how much governors, state budget offices and legislatures can dictate public campus finances at board expense without placing accreditation in serious jeopardy.

One final Northwest Association accreditation development requires discussion here. In December 1995, the Commission on Colleges approved for future Northwest Association use a new accreditation standard, Standard 8.B, which expressly augments governing board responsibilities and powers requirements. Standard 8.B is likely to be effective by 2001 (the year in which C-30 would have gone into effect had it received voter approval). Standard 8.b states:

> The governing board is ultimately responsible for the quality and integrity of the institution (or institutions in the case of the multi-unit system). It selects a chief executive officer; considers and approves the mission of the institution; is concerned with the provision of adequate funds; and exercises broad-based oversight to ensure compliance with institutional policies. The board establishes broad institutional policies and delegates to the chief executive officer the responsibility to implement and administer . . . [them].[200]

This new Standard seems clearly aimed at emphasizing that public governing boards, rather than state elected officials or their appointees serving at political discretion, must have responsibility and legal authority to exercise that responsibility over a state's campuses. Standard 8.B also matches the overall philosophy of the new Northwest Association requirements, which expressly provides that "accreditation . . . is intended

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199. *Id.*

200. NORTHWEST ASSOCIATION OF SCHOOLS AND COLLEGES, COMMISSION ON COLLEGES, INTERIM EDITION ACCREDITATION HANDBOOK 55 (Feb. 1996) [hereinafter INTERIM EDITION ACCREDITATION HANDBOOK].

to . . . protect institutions against encroachments which might jeopardize their educational effectiveness or academic freedom."[201]

It must be emphasized that neither the Northwest Association nor any other United States post-secondary institution accreditation entity dictates what legal form of governance a state should take. Additionally, no accreditation standards require creation of constitutionally autonomous boards, provided that the statutory powers conferred on such boards parallel those cited above. C-30 appeared to propose a new Education Commission, wholly dependent on a gubernatorially appointed Education Department head and on the Montana Legislature to define all commission and new department powers by statute. Thus, it is unclear whether the new department head could have exercised any meaningful powers over Montana's campuses or the Commission on Education without placing accreditation at risk. One must assume that if C-30 had been adopted, Montana's governor and legislature would have acted responsibly to avert accreditation problems by giving the Commission strong statutory powers (perhaps with campus president executive powers) and legal autonomy from the Governor's office. If history is any reliable guide, no responsible Montana governor or legislature would ever wish to see in Montana what happened in the southern states, as described below.

2. Accreditation Turmoil in Dixie: Southern Association Experiences with Public Board Autonomy Infringement

Dr. Delgado writes a compelling story of how various southern state governors and legislatures either cost or nearly cost their respective public campuses accreditation because of excessive political meddling in core campus governance functions.[202] Well-known political historical figures such as Long, Bilbo and Talmadge factor prominently in this story. Although the Southern Association of Colleges and Schools (Southern Association) rather than its Northwest Association counterpart serves as Dr. Cintron's focus, Montana's own history of political and financial interference with public campus activities brings the collective southern experience close to home. Perhaps the greatest historical significance of these southern experiences is how the voters

201. *Id.* at 1.
202. *See* Delgado, *supra* note 22.

in some states so adversely affected by political intrusions, took drastic action when faced with actual or threatened public campus accreditation loss. The voters of these states threw incumbent governors out of office; approved constitutional changes creating autonomous governing boards with powers similar to Montana's Board of Regents; and permanently solved their problems.

The southern accreditation saga began in 1930, with a Southern Association investigation of complaints that Governor Bilbo's dispute with the University of Mississippi chancellor caused Mississippi's public campuses to drop scores of faculty and administrators without warning, official written charges, or any modicum of due process.[203] These faculty and administrators were fired soon after Governor Bilbo packed the Board of Trustees of the state's public campuses with political cronies. His actions triggered accreditation suspension at all the campuses after the Southern Association found the Board "outside the category of educational bodies" which were required to keep accreditation. Reinstatement occurred only after Sennett Conner, who defeated Governor Bilbo two years later, promised the Southern Association he would reorganize the Board with members serving long staggered terms.[204]

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203. *See id.* at 76-78.

204. *See id.* Urging the Association to return accreditation, Governor Conner wrote:

> In the first place, the wholesale dropping of officers and teachers of our educational institutions brought forth immediately a storm of protest from an outraged citizenship and from the press within the state of Mississippi. Our people were indignant and deeply humiliated, but they were powerless until August, 1931. Then, in the Democratic Primaries which followed a campaign in which taking the University and colleges out of politics was one of the major issues, they condemned and repudiated this action and overwhelmingly defeated practically every candidate who sought to palliate or justify it.

Id. at 79 (quoting Governor Sennett Conner in SOUTHERN ASSOCIATION PROCEEDINGS 36 (1931)). The Southern Association restored accreditation only after finding that "the educational situation in . . . Mississippi has undergone radical changes; a new method of government has been devised for all . . . institutions, and a new Board . . . selected." *Id.*

The Association returned to Mississippi in 1946 to excoriate Mississippi's Board of Trustees for summarily dismissing the University of Mississippi Chancellor. *See id.* at 105. Although the Association did

> not find that the Board . . . failed to act within the scope of its legal power, nevertheless the manner by which the . . . [Chancellor] was dismissed was of a nature which the Commission deplores. The Commission further deplores the evidence of instability in the legal control of the University which seems significantly to be manifested by the lapse of more than half of a century since the head of this University has vacated the office by his

The Southern Association's next accreditation dispute occurred in Louisiana in 1934, after Governor Huey Long persuaded the Louisiana State University (LSU) Board of Supervisors to award a degree to a gubernatorial friend over faculty objection.[205] The Southern Association placed LSU on probation until the Board adopted new policies which required: (1) faculty approval of all degrees; (2) LSU presidential appointment of all LSU employees; and (3) the Board "to resist all types of outside interference with curricula or extracurricular activities" while empowering the President "to use the authority of [the] office and all legal powers of this Board to protect in every legal way . . . the University from such interference."[206] In 1935, the Southern Association placed another Louisiana public college governed by a different board on probation for several years until that board adopted reasonable tenure policies to keep Governor Long from meddling in faculty appointments.[207] These problems paved the way for Louisiana's 1940 constitutional amendment, similar to Montana's 1972 change, which granted full legal autonomy for all public boards.

Georgia saw the next Southern Association accreditation controversy after Governor Eugene Talmadge tried to manipulate the 1941 Georgia University System Board of Regents to fire a University of Georgia's Education Dean who supported integration.[208] The Southern Association threatened to revoke accreditation of all ten public campuses governed by the Board because the Board was incapable of making decisions free of political pressure and several state statutes gave the governor complete power over the university's budget.[209] The Southern Association

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own voluntary action.

Id. at 105 (citing SOUTHERN ASSOCIATION MINUTES 5 (1946)). This incident revealed accreditation concerns about "actual as well as potential governance infringements" regardless of whether the board decisions at issue complied with applicable state laws. *Id.* at 105-06.

205. *See id.* at 89-90.

206. *Id.* at 90-91 (citing SOUTHERN ASSOCIATION PROCEEDINGS 35-36 (1935)).

207. *See id.* at 91-92.

208. *See id.* at 102-04.

209. *See id.* at 102. The Association found:

> In light of all the evidence . . . the University System of Georgia has been the victim of unprecedented and unjustifiable political interference; that the Governor of the State has violated not only sound educational policy, but proper democratic procedure in insisting upon the resignation of members of the Board of Regents in order to appoint . . . men who would do his bidding; that the Board of Regents has flagrantly violated sound educational procedure in dismissals and appointments of staff members; that every institution in the System is profoundly affected by the precedents estab-

withdrew its threat after the Georgia Legislature corrected the legal conditions that triggered the threat and after Governor Talmadge "lost the gubernatorial election to Ellis Arnall whose platform pledged to depoliticize the higher education system."[210] That same year Georgia voters also approved a state constitutional amendment creating Georgia's presently autonomous Board of Regents. This board has seen no major accreditation problem since then.

The Southern Association suspended Morehead State Teachers College accreditation in Kentucky when that institution's governing board, whose members could be dismissed at gubernatorial whim, refused to block the governor's firing of the College President.[211] Accreditation remained revoked until 1948, after Governor-elect Clements personally appeared in 1947 to plead for reinstatement with a promise that he would secure enactment of a new law making it much more difficult to oust campus board members and administrators, and after he made good on this promise a year later.[212] The Southern Association also adopted new governance standards and requirements during this period which closely resemble the ones presently used by the Northwest Association as cited above.[213]

The Southern Association returned to Mississippi in 1962 to investigate reports that the Board of Trustees was relinquishing power to Governor Barnett in response to University of

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> lished; that there can be no effective educational program where this condition exists; *that in view of its (the Board of Regents) dependence upon the concurrence of the Governor in matters vital to the operation of the System, the Board . . . does not appear to be an independent and effective educational Board of Control.*

Id. at 103 (quoting ASSOCIATION QUARTERLY 314 (1942)) (emphasis added).

210. *Id.* at 103.

211. *See id.* at 115-19.

212. *See id.* at 115-19.

213. *See id.* at 110-12. Kentucky encountered much more serious difficulties in 1950, when the Association almost rescinded accreditation for all of the state's public campuses following enactment of a law that same year giving the State Finance Department and Governor "the power to stipulate the salaries and responsibilities of state employees" including those at public campuses. *Id.* at 140-41. The Association stated:

> These statutory provisions . . . deprive the Boards of Trustees and Regents of their control of the institutions of higher education by taking from them the power and authority to administer the affairs of their institutions. Such legislation is a violation of . . . [Association] principles . . . and is in conflict with its constitution and standards.

Id. at 141 (quoting SOUTHERN ASSOCIATION PROCEEDINGS 152 (1950)). This crisis resolved itself only after the 1952 election of a new governor who secured annulment of the 1950 law. *Id.*

Mississippi desegregation activity.[214] The Southern Association found these allegations generally accurate, but chose not to revoke accreditation right away because of the situation's volatility.[215] Instead, the Southern Association placed the University on a "watch" and warned state officials that accreditation could be lost by any weakening of Board powers or attempts to influence educational freedom.[216] Fortunately, the University of Mississippi situation resolved itself, the Southern Association was satisfied within weeks, and no further accreditation violations occurred in that state.[217]

Another accreditation controversy involved Florida's public campuses in the mid-1960s. The Southern Association targeted Florida's campus line item appropriations bill practices by the legislature, as a major violation of new Southern Association finance standards.[218] The Southern Association also expressed grave concern about State Budget Commission controls over campus faculty appointments and overall governing board autonomy.[219] The Southern Association nonetheless refrained from accreditation revocation pending the outcome of a 1965 special election that resulted in the creation of a more autonomous Board of Regents and a chancellor to govern the Florida system who was given broad statutory powers by the legislature.[220] This appeared to resolve Southern Association problems in Florida and no adverse accreditation action occurred.[221]

The final Southern Association accreditation conflict reviewed here occurred at University of North Carolina (UNC) in 1963, where the North Carolina Legislature passed "An Act to

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214. *See id.* at 161-67.

215. *See id.* at 166-67.

216. This included

> any encroachment by pressure groups, investigating committees or other agencies, as judged by normal standards, upon the freedom of the faculty, the administration, or the students to learn and teach;" or by "any manipulation of appropriation bills as a punitive measure or as undue influence upon internal operations of the institutions or any of them . . . .

Id. 161-67.

217. *See id.*

218. *See id.* at 167-83.

219. *See id.* Like Montana before 1972, a weak Board of Control with little legal authority administered Florida's public universities and this Board could not meet Association governance standards. The Association informed the state: "No educational institution is properly administered nor can it conduct a sound educational program when any agency or officer other than the controlling board, the president, and business officer exercises financial control." *Id.* at 171.

220. *See id.* at 170-71.

221. *See id.*

Regulate Visiting Speakers at State Supported Colleges and Universities."[222] The Act banned speakers who were either Communists or advocates of overthrowing the United States government. Enforcement of the Act invoked opposition from board members, administrators, faculty, and students from all over the state. The UNC's president requested the Southern Association refrain from adverse accreditation action pending proposed legislative repeal in 1965.[223] When the state's new governor proved unable or unwilling to meet these concerns in mid-1965, the Southern Association initiated accreditation revocation steps.[224] This caused the Governor to appoint a Speaker Ban Study Commission and later that year the legislature enacted a new law "returning the power to regulate speakers on campus to the board."[225] North Carolina's problems ended, along with other major Southern Association problems involving public board autonomy infringement by the states.[226]

The Southern Association experiences illustrate important lessons, beginning with the necessity for any state that contemplates public board legal changes to first carefully consider accreditation standards and rules. No state has the unfettered legal right to create whatever public campus or governance system it wishes without risking accreditation loss. It is not merely coincidental that the more legally autonomous southern state public boards became, the less frequently these states encountered accreditation problems.[227]

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222. *Id.* at 183.

223. *See id.* at 183-84. The Association nevertheless announced its intent to consider accreditation revocation at all campuses if this did not occur:

> Insofar as the act removes from the governing boards of state institutions of higher learning in North Carolina their traditional authority to handle such matters with administrative discretion, it raises an issue of interference with the necessary authority of the board. A governing board must protect the integrity of the colleges . . . . For this responsibility it requires commensurate authority. . . .

Id. at 184 (quoting SOUTHERN ASSOCIATION PROCEEDINGS 64-65 (1965)).

224. *See id.* at 184.

225. *Id.* at 184-85.

226. *See id.* at 185.

227. Whether such autonomy resulted from constitutional or statutory change may not seem too important at first glance, but once Louisiana and Georgia decided to adopt full constitutional autonomy, they had no further problems. This parallels the public higher education situation in Montana, where problems caused by undue political interference and a weak governing board disappeared with the autonomous Board of Regents' 1972 creation.

B. Academic Quality and Public Board Autonomy Relationships

The relationship between academic quality and governing board autonomy in United States public higher education has just recently started to receive scholarly attention. Dr. Eykamp's 1995 study promises further work in this field, however, since his assessment of forty-three United States public research universities found that "constitutional autonomy has a statistically significant effect on quality equal to a four standard deviation increase in state appropriations to the university; alternatively, a two standard deviation increase in total resources, including federal grants and contracts."[228] He further found that "political insulation for university governing boards provides large gains in university quality at no additional expense to the state."[229] These findings have great potential significance for state governments seeking new corporate investment dollars, since businesses frequently base such investment decisions in large part on whether the locations they invest in have high quality, research-oriented universities; sizable portions of these new corporate dollars find their way into campus coffers.[230]

To explain his findings and conclusions, Dr. Eykamp reasons that constitutionally autonomous boards have more insulation

228. Eykamp, *supra* note 27, at xvi.

229. *Id.*

230. *See id.* at 157-61. Dr. Eykamp's quality measurement indicia include those most often used in evaluating higher education institutions, including: (a) number and impact of faculty publications in relevant academic fields; (b) percentage of faculty who publish; (c) percentage of faculty who obtain federal grants; (d) the number of graduate students with definite job commitments at Ph.D. granting campuses; and (e) the number of undergraduates who ultimately receive terminal degrees. *See id.* at 137. He weighs federal research funds generation as key among these factors, since most federal dollars go to campuses based on merit and quality reflected in competitively bid awards. *See id.* at 161-62. Appendix 2 of this article ranks his qualitative winner institutions; and the list reveals that constitutionally autonomous boards govern most of the high quality U.S. campuses. Dr. Eykamp's quality rankings do not appear inconsistent with those seen in *America's Best Colleges*, U.S. NEWS & WORLD REPORT, Sept. 18, 1995, at 126-31, which generally rates the best U.S. private universities much higher than their public institution counterparts (at least arguably in part because of private board autonomy from state political interference). Among the most highly rated public campuses in the latter, flagship universities governed by constitutionally autonomous boards tend to score somewhat higher as a group than the others, although the University of Virginia (a statutory maximum autonomy campus) is the highest rated public campus of all. Also worth noting is heavy U.S. NEWS & WORLD REPORT reliance on both low student attrition and reputational quality nationally as key factors in its rating system, at least partly supporting the theory linking governing board autonomy and reputational quality. *See id.*

from direct political control and interference.[231] This, in turn, materially enhances campus quality by improving reputation, increasing research output, and generating more research dollars.[232] He also finds that constitutionally autonomous campuses receive four times as many state appropriated dollars and twice as many overall dollars, while non-autonomous campuses receiving higher state appropriations do not see material quality improvements.[233] Finally, he dispels notions that research universities governed by autonomous boards short-change teaching with his finding that autonomous campuses spend more on instruction in virtually all fields.[234]

Perhaps somewhat surprisingly, Dr. Eykamp found no significant relationship between academic quality and board autonomy over core fiscal or management functions such as: (1) personnel hiring and staff development; (2) budget pre-audits and post-audits; (3) purchasing; or (3) managing external grant, contract and gift revenues.[235] This may be best explained, however, by noting that no single one of these functions has as much significance as the presence or absence of a constitutional board to make and direct the most important institutional decisions free of political interference. Dr. Newman's earlier work which assessed the relationship between public campus autonomy and academic quality also concluded: "Although there appears to be a close relationship between the autonomy and flexibility accorded a public university by the state and the quality of that university, it is difficult to prove. This relationship eludes quantitative measurement, yet it is widely acknowledged."[236]

Dr. Eykamp expands the knowledge base about these issues, and more work is yet to be done regarding their implications. The Eykamp work quantitatively validates the theory, previously articulated by Dr. Newman, that public governing board freedom from political interference directly improves educational quality.[237] Former New Jersey Republican Governor Thomas

231. *See* Eykamp, *supra* note 27, at 260.
232. *See id.* at 261.
233. *See id.* at 260-61.
234. *See id.* at 262.
235. *See id.* at 263-64.
236. NEWMAN, *supra* note 165, at 9 (footnote omitted).
237. Dr. Newman stated:

> [W]hen universities of quality are needed, as the Chinese, for example, found after the Cultural Revolution, some buffering from the political system must be restored. The American approach has been to provide separation through a lay board of trustees and often through a legislated or con-

Kean, a national higher education reform leader, told his legislature:

> [A]cademics and statesmen have long recognized that one of the guarantors of freedom itself is the freedom of inquiry which the university must, by its very nature, espouse. It follows that the autonomy of the university, i.e., its ability to govern itself and to protect itself from external pressure and manipulation, is an essential condition of its very existence. In fact, the institutional support of academic freedom is so important that . . . truly . . . the academic community cannot be free if the institution is not free.[238]

Governor Kean's remarks underscore the generally undisputed principle that autonomy assures better teaching, research and service to the public, which in turn enhance reputational quality. A strong autonomy advocate, Dr. Newman believes that states must aspire to have high quality public higher education before they can attain it—but, then laments that the

> aspiration to have high quality universities is absent in . . . at least half of the states [because some] seem afraid of having a great university for fear that it will become a political threat or an expensive habit; [while others] simply do not believe . . . they have within themselves the ability to be first class.[239]

He also identifies three principal forms of intrusion which undermine autonomy and thus harm academic quality, including:

> *Bureaucratic intrusion*—"overregulation of activities for reasons that are usually legitimate but by means that ultimately interfere with the ability of the university to perform its function in a timely, efficient and creative manner" (fiscal micromanagement by state budget officials, unsuitable nonacademic personnel policies, etc.).[240]

> *Ideological intrusion*—"the attempt to interfere with the affairs of the university by preventing or insisting upon an activity

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stitutional provision of autonomy.

Id. at 7.

238. *Id.* at 7-8 (quoting Governor Thomas H. Kean, Address to the New Jersey State Legislature (Jan. 8, 1985)).

239. *Id.* He further observes: "Despite the difficulty of measurement, one can say with certainty that those universities ranked at the high quality end have . . . an effective relationship with their state that includes substantial flexibility. *Conversely, in those states where the relationship is poor, so always is university quality.*" *Id.* at 10 (emphasis added).

240. *Id.* at 23.

> strictly on ideological grounds," although this occurs as often from within the university as from political pressure groups or state officials.[241]
>
> *Political intrusion*—"interference in a decision to enhance the political interest of someone or some group in state government," such as patronage in obtaining campus jobs or contracts, blocking administrator and board appointments, curriculum mandates, etc.[242]

Dr. Newman expresses strong concern about intrusions by state agency employees into public campus governance, which he attributes to "the desire within the state bureaucracy to exercise power."[243] Such sentiment may arguably reflect an attempt to obtain more fiscal accountability. However, its adverse impact on public campus quality should be obvious.

Dr. Newman raises yet another quality concern of particular significance for states which opt for weak public governing boards. "If, for example, the system leadership is overly sensitive to the political winds, it will force the institution[s] to move in directions that may be counterproductive, a condition all the more dangerous because it comes from within the system."[244] He recommends certain antidotes to ensure quality such as: "The governor and legislators must support boards, chancellors and presidents who take the risks inherent in building a great and responsive university and analyze state actions to prevent unthinking disincentives to risk-taking."[245]

Assuming that Dr. Newman's recommendations are essential for high quality public universities, it is not altogether clear that C-30 would have supported any of them since its adoption would have eliminated a governance structure which now encompasses them all.[246] These public interest considerations must necessar-

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241. *Id.* at 24-26.

242. *Id.* at 27-31.

243. He cites one state budget director's remarks as graphic evidence: "I control every position in the state, from laborer to director [of a state department], except those in higher education. What makes the university think that it should escape?" *Id.* at 49 (alteration in original).

244. *Id.* at 57.

245. *Id.* at 99. Other antidotes are: "[C]reate incentives to ensure needed decisions that should be made on campus are made there and resist the temptation to make them by legislative mandate. Take clear steps to reduce unnecessary regulation or cumbersome bureaucracy while defining more clearly campus responsibilities." *Id.*

246. One more point about the quality-autonomy relationship merits reflection. An expert on U.S. public higher education governance changes in the past several years recently wrote:

ily shape any higher education governance system in any state.

C. *Legal Stability Considerations*

Constitutionally autonomous public higher education systems, institutions and boards tend to have greater legal stability and certainty because "legal precedents which have established the doctrine of constitutional autonomy could be relied on to reduce the number of issues subject to litigation."[247] Montana public higher education has experienced these benefits since 1972 under the current Board of Regents. Only two cases related to Board or campus power and authority have ever been filed and seriously litigated during this time (although the case currently pending before the Supreme Court against the Land Board as discussed below would be the third).[248]

Constitutionally autonomous systems, boards and institutions also tend to experience less litigation involving academic freedom and free speech issues when boards exercise their authority responsibly. This is understandable because "numerous [United States] Supreme Court decisions have heralded the university's need for autonomy" from outside political interference. Furthermore, once public campuses obtain such autonomy

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> Citizens have a lot at stake in the way higher education is governed. It is relatively easy to communicate the value of higher education's products, the importance of quality programs offered at a tuition rate that students can afford, and the need to provide a high level of access. In fact, the public clearly grasps these basic facts . . . [b]ut they do not often realize that *an effective governing system will help determine if those public goods are readily available. A dysfunctional or unstable system will not be able to advocate effectively for the resources necessary to maintain quality programs required by students in our knowledge-based economy. Nor will it lead, coordinate, manage, or plan the future for . . . universities in ways that enable these institutions to serve the citizenry well in the long run.*

Novak, *supra* note 33, at 16-17 (emphasis added).

247. Beckham Dissertation, *supra* note 5, at vii.

248. One case reflects 1975 Montana Supreme Court recognition of the Board as constitutionally autonomous; and the second involves a complaint unsuccessfully litigated to date by a plaintiff challenging campus authority to rent space to outside groups for revenue purposes. In contrast, the Montana Digest cites numerous legal opinions addressing governing board powers questions before 1972. *See, e.g.*, Brown v. State Bd. of Educ., 142 Mont. 547, 385 P.2d 643 (1963); State *ex rel.* Phillips v. Ford, 116 Mont. 190, 151 P.2d 190 (1944); State *ex rel.* Keeney v. Ayers, 108 Mont. 547, 92 P.2d 306 (1939); State *ex rel.* Dragsted v. State Bd. of Educ., 103 Mont. 336, 62 P.2d 330 (1936). The lack of such litigation since 1975 following judicial recognition of broad Board powers supports Professor Beckham's conclusion. Board of Regents v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975); The Duck Inn, Inc. v. Montana State Univ., DV-94-105, Montana Twelfth Judicial District Court, Hill County, *appeal dismissed* by Montana Supreme Ct., No. 95-177 (Nov. 7, 1995).

through constitutionally independent boards which are less susceptible to political pressure, the courts have less need to interfere to provide protection."[249]

Montana's public higher education history before the Board of Regents was created in 1972 reveals more than 80 years of legal instability and uncertainty over the extent to which a non-autonomous state Board of Education, charged with governing the state's public campuses, had sufficient legal authority to perform its responsibilities. As discussed above, no other state has a public higher education governance model resembling the one C-30 proposed. Thus Montana could not have learned from other states how to avert legal uncertainties in advance.

Both Dr. Reynolds and Dr. Beckham have studied how public boards have floundered along with state courts and legislatures in trying to govern their campuses and systems responsibly when they have had less than maximum autonomy and much uncertainty over their powers. This has usually resulted in a situation that is less than beneficial to the public interest.[250] Montana's 1972 Constitution framers created the Board of Regents here to escape this fate, and also to reverse Montana's long history of public higher education failures.

VI. WOULD C-30 HAVE WITHSTOOD A REALISTIC COST-BENEFIT ANALYSIS?

A number of other states have substantially revised their public higher education governance structures over the past decade. These experiences are now being carefully studied to determine if the costs of change have outweighed the benefits. The conclusion is that: "[g]overnance restructuring can bring about positive change in the long run. [B]ringing in new leaders with broader authority [and] restructuring . . . brought about changes that the prior regime would have resisted or lacked the power to enforce."[251] However, governance changes "can be

249. Kelly Knivila, *Public Universities and the Eleventh Amendment*, 78 GEO. L.J. 1723, 1731-32 (1990).

250. *See* Beckham Dissertation, *supra* note 5; Reynolds, *supra* note 12. *See also* James F. Shekleton, *The Road Not Taken: The Curious Jurisprudence Touching Upon the Constitutional Status of the South Dakota Board of Regents*, 39 S.D. L. REV. 312, 403 (1994) (describing how South Dakota, which has a constitutionally established public board subject to its state legislature's ambiguous statutory authority, has seen this ambiguity expose the state's public campuses "to unrestricted political intervention in all aspects of their governance, irrespective of any effects on academic standards or practices.").

251. Terrence J. MacTaggart, *Lessons for Leaders, in* RESTRUCTURING HIGHER

counterproductive and disruptive, distracting key parties from the main purpose of higher education."[252] Any new structure must be created to "transcend the talents of particular leaders."[253]

Although the benefits of major governance changes in other states are still being sought and assessed, the costs are already beginning to be known. "Higher, not lower, costs are likely, at least in the short run" based on changes made in Minnesota a few years ago.[254] The costs of changes in Minnesota may not have been identified until after the changes were legislatively mandated.[255] The cost was measured in terms of the fiscal impact of personnel classifications, technical systems, lost opportunities, and even the large amounts of overtime and comp time needed to discuss and implement the changes.[256] A recent study of major governance restructuring in Massachusetts, Alaska, Maryland, Minnesota and North Dakota reveals that only North Dakota has seen tangible benefits to date because of that state's constitutionally independent Board of Higher Education and history of "consistent strengthening of the authority of the Board."[257] C-30, as proposed, had little relationship to this North Dakota success formula. The other four states have yet to see any discernible fiscal or educational improvements. Evidence to date suggests more negative than positive consequences in areas such as: political instability (Massachusetts), poor campus personnel relations (Alaska), serious morale and implementation problems (Minnesota), and needless political antagonism which impeded the ability to achieve any discernible positive results (Maryland).[258]

A more appropriate approach to analyzing governance change costs and benefits is to ask some key questions about what the leaders of the state seek to accomplish with the changes. Education Commission of the States (ECS) advises that before changing its governance system materially, a state must

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EDUCATION: WHAT WORKS AND WHAT DOESN'T IN REORGANIZING GOVERNANCE SYSTEMS 235 (Terrence J. MacTaggart & Assocs. ed., 1996).

252. Novak, *supra* note 33, at 41.

253. *Id.*

254. MacTaggart, *supra* note 251, at 233.

255. *See id.*

256. *See id.*

257. Douglas M. Treadway, *Restructuring That Works: North Dakota, in* RESTRUCTURING HIGHER EDUCATION: WHAT WORKS AND WHAT DOESN'T IN REORGANIZING GOVERNANCE SYSTEMS 54 (Terrence J. MacTaggart & Assocs. ed., 1996).

258. *See* RESTRUCTURING HIGHER EDUCATION, *supra* note 33, at xiv-xv.

assess all fiscal and policy implications. In addition, the state should "clarify the state vision, goals and objectives for higher education [because] reorganization without a sense of purpose or direction may be more damaging than maintaining the status quo."[259] Montana's 1994 Task Force appeared to do little if any of this in recommending Montana's educational restructuring. This haphazard restructuring is condemned by Dr. MacTaggart for not really improving the quality of education.[260]

In addition, MacTaggart emphasizes that alternatives to complete restructuring should be considered when determining how to most effectively make improvements.[261] States should be especially careful that "[r]estructuring will [not] dominate the academic landscape, interrupt current operations, and drive out other worthwhile initiatives."[262] Finally, Dr. MacTaggart cites Edmund Burke's well-quoted maxim: "It is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree its intended social purposes."[263]

As required by Montana statute,[264] C-30 had a fiscal note designed to "inform" voters about the likely fiscal impact of C-30 adoption. However, the note stated that "the actual fiscal impact of this constitutional amendment cannot be determined at this time, as it would depend upon a budget proposed by the governor and approved by the legislature."[265]

The absence of any viable cost analysis related to C-30 seems to weigh heavily against favoring C-30 in any rational cost-benefit analysis when measured against the following: (1) the successes of Montana's present system; (2) Montana's bleak higher education history before 1972 which these successes have reversed; (3) experiences in other states which have benefitted from constitutional autonomy, while those without it have seen

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259. HANDBOOK, *supra* note 6, at 38-39.

260. "By itself, governance restructuring doesn't improve anything . . . . [O]ther than altering careers and reconfiguring organizational charts, these changes do not in themselves improve the quality of education or make the allotment of resources more efficient or accomplish any other noble purpose." MacTaggart, *supra* note 251, at 230-31.

261. Based on his review of the changes in all five states listed above, Dr. MacTaggart cautions: "Cheaper and less dramatic alternatives to restructuring should be considered first . . . [because major restructuring] is expensive and time-consuming, and its probability of achieving intended outcomes is by no means assured." *Id.*

262. *Id.* at 232.

263. *Id.* at 235-36.

264. *See* MONT. CODE ANN. § 13-27-315 (1995).

265. C-30 Fiscal Note, Montana Secretary of State.

little gain to date from their own governance changes; (4) some realistic accreditation risks in C-30's details; (5) emerging evidence linking quality higher education to constitutional autonomy; and (6) America's historical tradition of independent lay board control in most public education policy-making decisions.

VII. NEW CHALLENGES TO REGENTS AUTONOMY DESPITE C-30 RESULTS

The C-30 election results should have put the issue of Montana Board of Regents constitutional autonomy soundly to rest in favor of the Board. However, despite the proposed amendment's landslide defeat, the Regents' autonomy faces a two-pronged assault from legislators who proposed C-30 and did not like election results, and from the State Land Board which questions the Board of Regents authority to engage in University System real property transactions.

A. 1997 Legislative Attacks on Board of Regents Autonomy

Montana State Representative H.S. "Sonny" Hanson (the House Republican Majority Leader who sponsored the 1995 legislation which became C-30), was interviewed the day after last November's elections, and stated he did "not believe the vote proves that the Regents are doing a good job and many voters didn't fully understand the issue."[266] After the 1997 Legislature convened, he introduced House Bill 259, in concert with the Office of Public Instruction, which required the Regents to submit a unified budget request and placed various spending restrictions on the Regents in connection with their legislatively appropriated funds.[267]

About one month into the 1997 session, a group of Republican legislators (most of whom had supported C-30) introduced House Bill 500 requiring express statutory authorization for public universities and other Montana state agencies to engage in any activity which competed in any way with private enterprise. The bill which specifically targeted university research for this restriction passed the Montana House but was tabled in Senate Committee.[268] Former House Minority Leader Ray Peck,

266. MONTANA KAIMIN, Nov. 6, 1996, at A-1.

267. *See* H.B. 259, 55th Leg. (Mont. 1997).

268. *See* H.B. 500, 55th Leg. (Mont. 1997). Examples of University System campus activities not expressly authorized by Montana statute include virtually all University publications, such as the MONTANA LAW REVIEW and MONTANA KAIMIN; all

the leading Democratic proponent of C-30 in the 1995 Legislature, introduced House Bill 344 imposing numerous new restrictions on Board of Regents power to sell or exchange real property owned by the University System.[269] House Bill 344 sought to expand the scope of another Peck bill enacted into law in 1995, which also restricted Board of Regents power to sell or exchange University System real property.[270] After passing the House, more or less intact, House Bill 344 underwent substantial Senate revision and was reframed by the House in a manner far less intrusive into Regent power. The 1995 law and newly enacted House Bill 344, will likely receive close Montana Supreme Court constitutional scrutiny in the Board of Regents lawsuit against the Land Board discussed below. These bills reflect legislator reluctance to accept the apparent C-30 election mandate to leave the Board of Regents alone.

B. The Land Board Challenge to Board of Regents Autonomy

On January 6, 1997, the Montana Board of Regents filed suit in the Montana Supreme Court against the Montana Land Board seeking a declaratory judgment jurisdiction to resolve the issue of whether the Land Board has the authority to review and disapprove the Board of Regents' authority to sell or exchange University System real property.[271] The complaint seeks court validation of some three dozen transactions that were approved by the Regents (prior to the 1995 law) without Land Board review or approval. In addition, the complaint asks the court to determine whether the Land Board has the constitutional power to disapprove University System real property transactions despite the 1995 law requiring such approval.[272] The suit follows

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University System radio and television stations; most forms of research; legal clinics; virtually all continuing education courses; many university continuing education courses (which ostensibly compete with private, for-profit seminars); and even campus athletic events. As with C-30, House Bill 500 reflects radical departure from any other state's laws applicable to public university activity. Only three states have ever enacted this type of legislation, and all provide ample authority for their respective state governing boards to review and resolve such competition issues directly. *See* ARIZ. REV. STAT. ANN. § 41-275 (West 1996); COLO. REV. STAT. ANN. § 24-113-102 to -105 (West 1996); and IOWA CODE ANN. § 23A.1 to -23A.4 (West 1997).

269. *See* H.B. 344, 55th Leg. (Mont. 1997).

270. *See* MONT. CODE ANN. §§ 20-25-307, 308.

271. *See* Application for Original Jurisdiction; Petition for Declaratory Relief; and Memorandum of Authorities, Board of Regents of Higher Educ. v. State Land Bd., No. 97-010 (Mont. Sup. Ct. filed Jan. 6, 1997).

272. *See id.* at 1-2.

two years of controversy triggered when the University of Montana sold Fort Missoula to private developers. The result of the dispute was based on an issued opinion by the Montana Attorney General which held that the sale was invalid because it did not follow certain statutory procedures applicable to other public land sales.[273]

Throughout the Fort Missoula controversy, the Board of Regents maintained that it had the constitutional authority to sell Fort Missoula land based on the 1972 Constitution granting the Board its legal autonomy. In the end, the Board repurchased the land without ever pressing the point in court.[274] However, following the repurchase, the Land Board asked the Attorney General to review all University System land sales and exchanges approved by the Regents since 1973 and the Attorney General concluded that all were likely illegal based upon the Regents' alleged lack of authority to approve the transactions without Land Board approval.[275]

The legal issues here appear especially complicated based upon a 1980 Land Board disclaimer of jurisdiction over University System land transactions, and a 1994 Attorney General Report which contrasted with the 1997 Attorney General Report. The 1994 Report suggested that the Regents had far greater legal autonomy over all University System activity, including real property transactions.[276] The Board of Regent's lawsuit against the Land Board relies heavily on the reliance created by the 1980 disclaimer and also attacks the 1995 statute as unlawful encroachment on Regent constitutional authority to make decisions in the University System's best interests.[277] The Land Board's February 7, 1997 response vigorously contests the Regents' legal position and the Montana Supreme Court's original jurisdiction to hear the case.[278]

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273. *See* OFFICE OF THE MONTANA ATTORNEY GENERAL, REPORT TO THE STATE LAND BOARD: THE DISPOSITION OF PUBLIC LANDS BY THE MONTANA UNIVERSITY SYSTEM SINCE JUNE 6, 1972 50 (Feb. 20, 1996) (citing letter from Joseph P. Mazurek, Montana Attorney General, to Board of Land Commissioners (Aug. 17, 1995)). The Attorney General cited Article X, Section 11 of Montana's Constitution and Section 77-1-101 et seq. to support his position that all public lands were subject to Land Board control and approval before they could be sold.

274. *See id.*

275. *See id.*; OFFICE OF THE MONTANA ATTORNEY GENERAL, REPORT TO THE STATE LAND BOARD: LEGAL ANALYSIS OF THE DISPOSITION OF PUBLIC LANDS BY THE MONTANA UNIVERSITY SYSTEM (Apr. 15, 1996).

276. *See* Application for Original Jurisdiction, *supra* note 271, at Exhibits 1 & 2.

277. *See id.* at 12-15.

278. *See* Response to Application for Original Jurisdiction and Petition for De-

The Montana Supreme Court will ultimately decide all the issues raised in the *Board of Regents v. Land Board* unless the parties settle. Any assessment of the merits here would be premature speculation. Review of this case simply serves to illustrate how both the Land Board and the Montana Legislature is reluctant to recognize the authority of the Board of Regents to continue what it has been doing since its 1972 creation without legal or political objection—entering into land transactions. Such reluctance suggests that, notwithstanding the decisive C-30 election results, the autonomy issue may remain polemic enough to trigger future C-30 efforts. Should this occur, Montana must then reconsider all the legal and policy issues disposed of when the voters defeated C-30 last November. Current Montana statutes quite possibly offer a basis for resolving them.

VIII. FURTHER LEGAL CONSIDERATIONS AFFECTING FUTURE C-30 ADOPTION

Assuming Montana voters revisit and approve some future type of C-30 proposal to limit Board of Regents powers, certain legal precautions should be taken to mitigate the potential harms cited above. For example, the four-year effective date delay contained in C-30 seemed necessary to give Montana's Governor, Legislature, and other state leaders time to plan the transition. This transition time should be spent effectively with the best interests of the state in mind. Careful attention should be given to the specific legal structure to be used in governing the University System.

If the Montana leaders opt not to return to the previously failed pre-1972 system, but instead implement a new structure, this structure would have to meet one core pre-requisite for any new non-constitutional governance structure adopted—accreditation standards. Accreditation standards require strict adherence to the requirement that there be a legally autonomous board with maximum statutory protections from legislative and executive branch interference (with core university governance powers). At a minimum, these powers would require that any non-constitutional governing board have statutory authority to: (a) make all significant budget and spending decisions, including those related to employee compensation, student fees and campus categorical spending; (b) initiate and defend

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claratory Relief, Board of Regents of Higher Educ. v. State Land Bd., No. 97-010 (Mont. Sup. Ct. Feb. 7, 1997).

against lawsuits, consistent with accreditation mandates that governing boards have sufficient power to protect their campuses from external pressures; (c) appoint all campus chief executive officers, as well as grant final approval to all campus personnel appointments unless this is delegated to the campuses themselves; and (d) set all academic policies affecting curriculum and degrees.

Montana Code Title 20, Chapter 25 appears at initial glance to provide an ample statutory basis for meeting most accreditation concerns with relatively little change if any new board were given the same statutory powers presently afforded the Montana Board of Regents. This Chapter expressly empowers the Board to "have general control and supervision" over Montana's public campuses and "adopt rules for its own government . . . that are proper and necessary for the execution of the powers and duties conferred upon it by law," and also "rules for the government of the system" to the extent consistent with Montana's Constitution and statutes.[279] The Chapter gives the Board powers of general control of: (1) all System receipts and disbursements;[280] (2) substantial spending and borrowing authority;[281] (3) setting student tuition and fees;[282] (4) appointing "a president or chancellor and faculty" and "any other necessary officers, agents, and employees, and fix[ing] their compensation;"[283] (5) power to delegate to Presidents and faculty "authority relating to the immediate control and management" at each System campus, other than final financial or faculty selection decisions;[284] (6) conferring all degrees[285] and eliminating needless course duplication;[286] and (7) approving all types of contracts for campus research and development activity.[287]

The only issue that appears to be left unaddressed in Montana statutes is legal standing to sue and be sued. (This is an explainable omission given the Board's independent constitutional entity status; and this could be easily addressed by statute similar to the one granting similar legal power to Montana's

279. MONT. CODE ANN. §§ 20-25-301(1) to -301(3) (1995).
280. *See* MONT. CODE ANN. § 20-25-301(8) (1995).
281. *See* MONT. CODE ANN. § 20-25-402 (1995).
282. *See* MONT. CODE ANN. § 20-25-421 (1995).
283. MONT. CODE ANN. § 20-25-301(9) (1995).
284. MONT. CODE ANN. § 20-25-301(10), (11) (1995).
285. *See* MONT. CODE ANN. § 20-25-301(4) (1995).
286. *See* MONT. CODE ANN. § 20-25-301(12) (1995).
287. *See* MONT. CODE ANN. § 20-25-108 (1995).

Self-Insurers Guaranty Fund Board).[288] Current Code provisions, left substantially intact or readily amended and transferred to a new type of governing board, could meet most or all accreditation requirements and legitimate policy concerns.

Several other state governance legal models, other than one based on full constitutional autonomy, appear similar to what Montana could face if some version of C-30 were ever approved, at least with regard to governing board authority. Wisconsin, which has a top quality public university system by any reasonable measurement criteria, achieves this almost solely by a statutory Board of Regents responsible for governing the state's multiple campuses through general statutory powers provided by the Legislature, including powers to appoint the System President and all campus chancellors as well as others similar to Montana's.[289] Its sole constitutional language applicable to campuses states: "Provision shall be made by law for the establishment of a state university . . . and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require."[290] No board is even mentioned.

The University of Virginia Board of Visitors, created by Thomas Jefferson to design and govern a public campus to be known for academic excellence, likewise derives virtually all authority from a Virginia General Assembly which statutorily empowers the Board to appoint a President, define faculty duties, and "generally, in respect to the government and management of the University, make such regulations as they may deem expedient, not being contrary to law."[291] Virginia's Constitution merely authorizes legislative creation of public universities, and provides that "governance of such institutions, and the status and powers of their boards of visitors or other governing bodies, shall be as provided by law."[292]

Oregon's State Board of Higher Education governs all public universities with no constitutional reference to either the Board or the campuses. Instead, the Board has statutory authority to

288. *See* MONT. CODE ANN. § 39-71-2611 (1995).
289. *See* WIS. STAT. ANN. §§ 36.09, 36.11 (West 1996).
290. WIS. CONST. art. X, § 6.
291. VA. CODE ANN. § 23-76 (Michie 1996).
292. VA. CONST. art. VIII, § 9. The University of Washington Board of Regents acts pursuant to almost identical statutory and constitutional language, which names neither the Board nor the University. *See* WASH. REV. CODE ANN. § 28B.20.130 (West 1996); WASH. CONST. art. 13, § 1.

appoint all campus presidents and its own chancellor to oversee them with broad powers to set all policies, rules and regulations it deems in the state's best interest.[293]

These and other states' governance models afford Montana ample opportunity for a viable, healthy public university system if it chooses. To do so, Montana would need to ensure that any adoption and implementation of some C-30 variation at the same time protects the campuses and their governing board from too much dominance by executive branch agencies and leaves the present state statutory scheme intact. However, for this to occur the type of Education Department and Director called for in C-30 would have to be given subservient roles to the governing board so that the latter could wield actual legal authority on its own. To avoid making the governing board and state campuses captives of the executive branch, which would soon stifle the significant Montana University System improvements to date, it may also be necessary to grant legal authority and sufficient funding for any new governing board to hire its own chief executive officer subject solely to board appointment and removal without gubernatorial or Education Department control. This is needed regardless to avoid the legal instability and accreditation problems cited above.

IX. CONCLUDING REFLECTIONS

In reviewing the C-30 issue and how Montana voters decided, a number of key conclusions can be drawn: First, most United States public higher education systems, campuses and governing boards do not have constitutionally autonomous status, although those which do seem to benefit from better quality education programs, greater fiscal and legal stability, and fewer likely accreditation problems. More significantly, no state governance system resembles the one C-30 proposed which permitted university decision-making by a partisan political appointee. This factor alone probably justifies the C-30 defeat, (given the United States preference for empowering lay governing boards to make these types of decisions). Second, viable United States public higher education requires governing boards to be legally independent from legislative and executive agency interference to the

293. *See* OR. REV. STAT. § 351.060 (West 1996). Moreover, the 1995 Legislature increased Board autonomy over all purchasing, procurement and contracting of goods and services to encourage better resource utilization. *See id.* This is not atypical of most states' recent increased autonomy for campuses.

full extent practicable without regard to the specific state legal model needed to achieve such independence. Board legal autonomy, whether derived from constitutions or statutes, still subjects public campuses and systems to accountability on all important matters while protecting them from trivialities which sap quality at taxpayer expense.

Third, C-30 proponents relied on a 1994 Task Force which appeared to purposely encourage Montana's return to an education structure that sorely failed the state for many decades. Montana higher education history compels extreme caution when considering any measure which is capable of steering public campuses back to the disastrous days before 1972.

Finally, there has never been the necessary analysis of what the costs or benefits of C-30 would be. The lack of motivating evidence casts serious doubt about why any change was ever needed.

It is neither impracticable nor inconsistent with the laws of most other states to create a viable governance alternative to Montana's present Board of Regents. However, the obvious lack of discussion during the C-30 debate about the requirements for a viable public higher education governance system, its feasibility and effectiveness probably led to the decision by Montana voters to stay with the status quo. Proponents of any governance change in Montana must demonstrate how their new system will not return Montana to the poor conditions present in pre-1972 higher education history. They must also assure Montanans that any alternative system will result in university quality and an avoidance of political meddling at least comparable to public higher education systems in other states. Until those who propose drastic change to the Board of Regents structure present this information to the voters, Montanans are well-advised to resist changes as they resoundingly did when Montana voters defeated C-30 at the polls.